

CONTEMPORARY ISSUES IN TERRORISM AND THEIR ISLAMIC PERSPECTIVES: A COMPARATIVE ASSESSMENT

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Abstract

Various issues pertaining to global terrorism have been extensively debated. The most complex area of discussion has been to arrive at a widely acceptable definition because no definition can serve everyone's aspiration. It does not mean we should not make further efforts to arrive at a universally viable definition. It is rightly said that a feasible definition can be reached only when reasons, which compel groups of people to resort to terrorism, are given due consideration, as no one wants to risk his life. It is, therefore, necessary to explore the reasons of terrorism and hit at its roots, rather than giving it a symptomatic treatment in the name of 'war on terrorism' or a 'long war'. The paper discusses about various reasons that are considered to have created impediment in reaching a universally acceptable definition. It is true that there cannot be all-encompassing definition, but we can have one that covers the maximum of them. It is not within the scope of the paper to discuss various definitions. The paper simply considers them collectively from the Islamic perspective. It also makes efforts to suggest a workable definition. It has now been proven that Islam encourages religious tolerance and peace and amity among the people of all faiths rather than encouraging terrorism. The paper sheds light on the Islamic aspects of terrorism, and goes further to compare the western law and practice pertaining to taking captives, treatment of prisoners of war, and providing them appropriate access to justice with their Islamic conceptions, which will be a unique exposition. For this purpose, original sources of Islamic Shari'ah, based on Qur'anic verses (ayah) and Sunnah (Prophetic traditions) have been resorted to.

INTRODUCTION

Terrorism has blighted human civilizations for as long as we can remember.¹ It is hard to believe that a word like 'terrorism', which is used so frequently these days in different context in causal, colloquial, political, and legal discourses, does not have a universally accepted definition.² Black's

¹ Shad S. Farooqi, "Agony and Ambivalence about the War on Terrorism", Paper presented at *Civilization and Terrorism: A Round Table Dialogue*, one-day seminar, UiTM, Malaysia, 26 February 2002.

² The word 'terror' was first used to describe the Jacobin 'Reign of Terror' that followed the French Revolution in 1789. The legal response to terrorism seen in various events convened in various capitals of European countries throughout 1920s and 1930s. See John F. Murphy, "Defining International Terrorism: A Way Out of Quagmire" 19 *Israel Yearbook on Human Rights*, 1989, p. 14; Geoffrey Levitt, "Is 'Terrorism' Worth Defining," 13 *Ohio Northern University Law Review*, 1986, p. 97; Susan Tiefenburn, "A

Law Dictionary defines it as: “the use of threat of violence to intimidate or cause panic...” In common parlance, it is an act by which people in general feel terrified. Technically speaking, it is an act or a series of acts generally committed by an organization, or a state, which terrorize people discriminately or indiscriminately with or without an ulterior motive or gain. The word ‘terrorism’ is of recent origin, but terrorist acts are as old as the history of man. Initially, terrorist acts were sporadic and limited to only certain parts of the world. Now, the menace of terrorist activities knows no boundaries and the scourge of such activities is engulfing the whole world. It has become endemic. It is a nightmare to a vast majority of the world’s population, especially to those living in such states that are terrorizing some parts of the world in the name of eradicating terrorism. Terrorism is a maniacal regime built on cruelty and violence that invariably violates human rights. Because of this, it has always been condemned, considered as outrageous, abominable and abhorrent, and declared illegal. The United Nations Security Council in its Resolution 1373, which was passed after the 11 September 2001 horrendous act, rightly considered terrorism a threat to international peace and security. Islam also holds the same view on terrorism. However, to consider those, who are fighting for liberation of their territories occupied by others, as terrorist has been a debatable issue.³ But this causes difficulty, as one person’s freedom fighter can be a terrorist for another person. ‘Terrorism’, thus, is a polymorphous term, its meaning changes with the change of situations under which acts are committed. In 1988, one international scholar noted 109 different definitions, but none among them, is considered to cover all aspects of terrorism. Laws have always been there for abatement and control of terrorism. The scope of laws is being widened with the emergence of new dimensions of terrorism, like cyber-terrorism, bio-terrorism, and economic terrorism.⁴ But the irony is that the world is fighting a war against terrorism, without having a widely acceptable definition for it. This is because none of the definitions suits all. It does not mean that further attempts should not be made.⁵ In fact, efforts, at all levels, are still being made to have a viable definition.⁶ We need an all-encompassing definition because it is more than a mere synonym to

Semiotic Approach to A Legal Definition of Terrorism”, 9 *ILSA Journal of International and Comparative Law* (ILSA J. Int. & Com. L.), 2003, p. 357, at p. 358.

³ This comes within the fold of self-liberation. Everyone knows that Palestinian lands have illegally been occupied by Israel. Brutal, merciless, bloody and destructive incursions into Palestinian camps, which can never be justified on the principles of law of war, are also open facts. Palestinians, on the other hand, are fighting with limited means they have, for liberation of their land. But the irony is that Israel, which has no respect to UN Security Council Resolutions and has invariably violated international law, is justified by so called depositories of the peace of the world; and they consider the freedom struggle of Palestinians as terrorist acts.

⁴ Tun Dr. Mahathir Mohamad, the former Prime Minister of Malaysia, in his speech delivered at the Lankawi International Dialogue 2002 in Lankawi, Malaysia, on August 1, 2002, specifically discussed “Economic Terrorism”. He said, “They [newly independent countries] are terrified or being colonized once again through economic pressure coupled with the propaganda of the media. They are being terrorized; terrorized in the same way that the terrorists are threatening the world. See Mahathir Mohamad, *Terrorism and the Real Issues*, Hashim Makaruddin (ed.) (Subag Jaya: Pelanduk Publications, 2003), p. 97.

⁵ At the Special ASEAN Ministerial Meeting on Terrorism, Kuala Lumpur, May 19-21, Abdullah Ahmad Badawi, the Prime Minister of Malaysia, made a remark that the meeting stopped short of adopting a common definition of terrorism. It would pose political difficulties. See *New Straits Times*, 22 May 2002.

⁶ See G. Levitt, “Is Terrorism Worth Defining?”, *Ohio Northern University Law Review* (Oh. NULR.), 1986, Vol. 13, p. 97; D.C. Rapoport and Y. Alexander, *The Morality of Terrorism: Religious and Ethical Implications* (New York: Pergamon, 1982), p. 30; W. Laqueur, *The Age of Terrorism* (Boston: Little Brown, 1987), p. 11; T. H. Michell, “Defining Terrorism”, in D. A. Charter (ed.), *Democratic Responses to International Terrorism* (New York: Ardsley-on-Hudson, 1990), p. 9; N. W. Provizer, “Defining Terrorism”, in M. Slann and B. Schechterman (eds.), *Multidimensional Terrorism* (Boulder: Lynne Reiner, 1987), p. 3; Ashraf Abdullah, “Defining clearly what is terrorism”, *New Straits Times*, 19 September 2001; Munir Majid, “Terror: still searching for answers”, *New Sunday Times*, June 9, 2002. Abdul Haseeb Ansari, “Terrorism, National Integrity and Human Rights”, 3 *Malayan Law Journal* (MLJ), 2002, pp. ccv-ccxI.

dismay as it seeks to impose a degree of order to a subject and establishes a common frame of reference, and because due to a series of legal, political, social, and economic consequences of describing someone as a terrorist, or an action as terrorism.⁷ We need to have it as it is a growing concept and relates to diverse groups.⁸ In this respect, Thomas H. Mitchell writes that the word 'terrorism' suffers from the following obstacles: 1. It suffers from an implicit condemnation. 2. It is a heterogeneous phenomenon. 3. It does not take into account constantly changing nature of tactics, targets, and strategies, as well as impacts of the technological innovations such as new techniques of media coverage and advanced weapons.⁹ This paper examines some of the definitions, including the one given by the Organization of Islamic Conference (OIC), for that reflects the collective will of Muslim states.¹⁰

All religions are for fostering peace, amity among the human kind and their ultimate salvation and reward. So is Islam. It is highly unfortunate that Muslims are associated with many of terrorist organizations around the globe, for whatever reasons. Some lopsided western thinkers and media are identifying them with Islam, which has virtually proven to be counter productive and resulted in the state of conflict between two popular religions of the world, which is differently put as clash of civilization. This perception exists even though truly speaking a vast majority of Muslims of the world is against terrorism and is fighting by all means against extremists. The paper sheds some light on this aspect of terrorism.

We know that prisoners of war (POWs) have to be treated in accordance with the III Geneva Convention Relative to Treatment of Prisoners of War 1949 (Hereinafter Geneva Convention).¹¹ But there are grave violations of the treaty norms of the Convention. This is because of the envy feelings of some states and their soldiers against POWs besieged their minds. Islam's teaching on POWs is against this kind of feelings, as it is based on clemency. The paper will make a humble attempt to delineate comparison and contrast of the two laws.

Inhuman treatment of POWs, humiliating them and their religions and inflicting all kinds of torture on them is also exceedingly common at the detention places, including the Abu Graib prison of Iraq and the Guantanamo Bay detention camp. This is a grave violation of the Geneva Conventions and the Anti Torture Convention, but powerful countries do not care about such laws. Islam's teaching is entirely different than this. This aspect of Islamic law will be discussed.

We have noticed that most of the detainees at various detention camps, including the detainees of the Guantanamo Bay, have so far spent more than 2-6 years, which is a sheer denial of their right to access to court, e.g. 'due process'. Islam's teaching, on the contrary, is to release them unconditional, or to try and punish them if they have committed any crime, for which they can be subjected to penalties, or to free them on payment of ransom, or to exchange them with the

⁷ See Richard R. Baxter, "A Skeptical Look at the Concept of terrorism", 7 *Akron Law Review* (ALR), 1974, p. 380.

⁸ See B. Jenks, "The Study of Terrorism: Definitional Problems", in Yonah Alexander and John Gleason (eds.) *Behavioral and Quantitative on Terrorism* (New York: Pergamon, 1981), pp. 3-10; Abdul Haseeb Ansari, "Terrorism, National Integrity and Human Rights", *The Malayan Law Journal*, ccv, at p. ccviii; Susan Tiefenburn finds two difficulties in defining terrorism: First, it is necessary to distinguish between three different conceptions of terrorism: terrorism as a crime in itself, terrorism as a method to operate other crimes, and terrorism as an act of war. Second, there is no universally accepted definition. According to her, it is necessary to resolve the underlying paradoxes. Authors feel that terrorism exists *sui generis* as a crime. See Susan Tiefenburn, footnote 2, at p. 359-359.

⁹ Thomas H. Mitchell, "Defining Terrorism", in D. A. Charter (ed.) *Democratic Responses to International Terrorism* (New York: Ardsley-o-Hudson, 1990), p. 9, at p. 11. Similar points have also been given by Jean-Mark Sorel, in "Some Questions about the Definition of Terrorism and the Fight Against its Financing", 14 *European Journal of International Law* (EJIL), 2003, p. 365.

¹⁰ This may be noted here that United Nations is proposing to have a comprehensive legal regime on terrorism. This will also have a definition.

¹¹ See *infra*.

prisoners in their countries. It opposes to detain any of the POWs for a longer period. This Islamic law will be discussed.

In view of the predominant feeling of national integrity and protection of human rights that are invariably being threatened by subversive terrorist acts, many states have made anti-terrorism laws. Legislations generally provide, along with prescribing certain activities as terrorist acts, subjecting terrorists to stringent penalties, and for detention of suspected terrorists. But most of these legislations, especially that of the United States and the United Kingdom, are considered to have severely violated universally acclaimed human rights.¹² The worst aspect of these legislations is that they, in effect, discriminate foreign nationals from their own citizens and provide for illegal deportation. In fact, these legislations serve the interests of the state only.¹³ Laws against terrorism that also provide for detention and interrogation of suspected terrorist on the basis of administrative orders are warranted. But in view of grave misuse of such laws, it is necessary to suggest for striking a meaningful balance between the state interests and the protection of human rights. The paper will critically examine provisions of some of the legislations from this point of view. This kind of preventive detention is against the Islamic teaching. Islam subscribe to the idea either try and punish or free. It opposes even normal interrogation in captivity. This aspect of Islamic law will also be examined.

TO HAVE A VIABLE DEFINITION

In spite of the fact that there exists a myriad of definitions of the polymorphous word 'terrorism', various dimensions of the word is well understood – which is the result of intellectual exercises made individually by certain experts,¹⁴ by states through terrorism legislations,¹⁵ and by collective efforts of states¹⁶ through various global conventions made mainly under the auspices of the United Nations.¹⁷ But none of the definitions is widely accepted because most of them

¹² The United States and the United Kingdom, who were critical of preventive detention laws of other countries, now have even worst quality of laws that do not have any regard for human rights at all.

¹³ It is because an excessive use of power by the state might results in injustice, and that might itself perpetrate violence or threat of violence.

¹⁴ Notable among them are: Thompson P. Thornton, "Terror as Weapon of Political Agitation", in H. Eckstein (ed.) *International War: Problems and Approaches* (New York: Free Press, 1964), pp. 73-74, 77-78; Micheal Stohl, "Demystifying Terrorism: The Myths and Realities of Contemporary Political Terrorism", in Micheal Stohl, *The Politics of Terrorism*, 3rd Edition (New York: Dekker, 1988), at P. 3; Arend and Beck, "Do Not Tread on US: International Law and Forcible State Response to Terrorism", 12 *Wisconsin International Law Journal*, 1994, p. 148 at p. 153; Yonah Alexander and Edger H. Brener, *Terrorism and Law* (Inc.: Transnational Publishers, 2001) at p. 7; Cherif Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* (New York: Transnational Publishers, 2001), p. 4; Jean-Mark Sorel, "Some Questions About the Definition of Terrorism and the Fight Against its Financing", *European Journal of International law*, 2003, at p. 365.

Among Muslim leaders who have contributed in reaching at a viable definition, Dr Mahathir Mohammad's contribution is remarkable. See *New Straits Times*, 2 April 2002.

¹⁵ For a critical appraisal of various definitions, see Abdul Haseeb Ansari, "Terrorism, National Integrity and Human Rights", [2002] *Malayan Law Journal* (MLJ), p. ccv; Abdul Haseeb Ansari and Nik Ahmad Kamal, "Terrorism, Law and Human Rights", *IKIM Law Journal*, vol. 9, 2005. p. 13; (US) Anti -Terrorism Act, 1996; (US) Anti Terrorism Crime and security Act 2001; United States Patriotic Act 2001; United States Financial Anti -Terrorism Act 2001; (UK) Prevention of Terrorism (Temporary provision) Act 1984; Prevention of Terrorism (temporary provision) Act 1989; United Kingdom Terrorism Act 2000; and Security Legislation Amendment (Terrorism) Act 2002.

¹⁶ See Abdul Haseeb Ansari, and Abdul Haseeb Ansari and Nik Ahmad Kamal, *ibid*.

¹⁷ The following 14 treaties specifically deal with terrorism: Convention for the Prevention and Punishment of International Crimes, 1937, and Convention for the Creation of International Criminal

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generally cover the functional aspects of 'terrorism', or because some of them, along with this, cover only limited dimensions of terrorism. For example, most of the definitions do not encompass state terrorism; some of them are limited only to the political reasons of terrorism; some others do not consider those who are fighting for liberation of their territories as an exception to 'terrorists'; most of the conventions on terrorism merely define certain terrorist crimes and prescribe punishments for them; and some definitions, contained in state legislations, go beyond their territories.¹⁸ Presidents and Prime Ministers of 160 countries met at the 60th United Nations General Assembly on 14-16 September 2005 and deliberated on various aspects of terrorism, including its definition, but in spite of the EU arguments in favour of adopting the Draft UN Comprehensive Convention on International Terrorism, including a legal definition of terrorist acts, consensus in favour of a viable definition could not be reached.¹⁹ This kind of effort has also been made by the Convention of the Organization of the Islamic Conference on Combating International Terrorism 1999. The definition given in the Convention runs as: "Terrorism means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedom, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or political unity or sovereignty of independent states." According to the Convention, 'terrorist crime' means any crime executed, started or participated in to realize a terrorist objective in any of the contracting states or against its nationals, assets or interests or foreign facilities and nationals residing its territory punishable by its internal law. It also includes terrorist crimes prescribed in the 12 international conventions already existing before it was made.²⁰ This definition is too wide to cover an extensive spectrum of terrorist activities. However, it does not mention about state terrorism or state-sponsored terrorism. We can note that the OIC Convention, for penalizing terrorist acts, depends on the

Court, 1937 (These conventions did not come into force due to want of ratification); Convention on the Prevention of and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973; International Convention Against the Taking of Hostage, 1979; International Convention for the Suppression of Terrorist Bombing, 1997; International Convention for the Suppression of the Financing of Terrorism 1999; Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963; Convention for the Unlawful Seizure of Aircraft 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971; Convention on the Physical Protection of Nuclear Material 1980; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988; Convention on the Making of Plastic Explosives for the Purpose of Detection 1991; and Convention for the Suppression of Acts of Nuclear Terrorism, 2005, which has been adopted by the General Assembly on 13 September 2005. This Convention calls for states to make nuclear terrorism activities criminal offences and for sharing information and extradition of suspects in such cases. It also calls for outlawing and condemning terrorist activities, along with:

- ♦ demonstrating global unity in opposition to terrorism; and
- ♦ treating terrorism as a matter subject to domestic and international law; and challenging states to use, and if necessary adapt, their domestic legal systems to combat terrorism.

¹⁸ See Abdul Haseeb Ansari and Nik Ahmad Kamal, footnote 15 at p. 32.

¹⁹ See *New Straits Times*, 16 September 2005. For the EU arguments, visit www.parliament.org.uk/docs/0507/doc06.htm

²⁰ For the full text of the OIC Convention, see *International Instruments Related to the Prevention and Suppression of International Terror* (UN, New York, 2001), at pp. 187-209.

state law. This will always lead to the variegated approach of penalizing such acts. Dr. Rao has rightly pointed out that reliance on the internal law of the state could create different standards for punishing a particular conduct. Further, no action against a terrorist offence would be possible when the conduct involved is not prohibited by the internal law of the interested state, even if the law of the requesting state and the provisions of the relevant international convention treated such conduct as a terrorist crime.²¹ It will be appropriate to say that the definition given by the OIC Convention is of immense value it is in conformity with the Islamic teachings on terrorism and all Muslim States endorse it. It does not mean the definition contained in the OIC convention on terrorism is all encompassing and will be acceptable to all states. This definition has also been subjected to criticism.

So as to make it acceptable to a maximum number of states, it can be revised or a new definition, which does not violate the rules of divine wisdom contained in Qur'an and sunnah (Prophetic traditions) can be devised. Towards this end, the 1999 Convention on Suppression of the Financing of Terrorism is notable. Efforts are being made to have a Global Convention on terrorism. The UN General assembly is already discussing a Draft Global Convention on International Terrorism. It has a comprehensive definition of 'terrorism'. Although it is not acceptable to all states, it can be an alternative to the definition contained in the OIC Convention, and as it does not violate divine injunctions it will be acceptable to Islamic states as well. The author is of the opinion that further discussions should be augmented soon so that a workable and widely acceptable definition is finally reached.

Although it has been stressed time and again that there should be a universally accepted definition,²² it is an arduous task, which suffers from numerous difficulties because 'terrorism' is a polymorphous term. Some of the difficulties that need to be hammered out amicably are:

General or Specific Definition

Definitions are either general and applicable to all kinds of terrorist acts or specific, or limited to certain acts to be considered as terrorist acts. In the first case, states or courts have more right to interpret and widen the scope of the definition as they wish. On the contrary, with respect to a specific definition, only literal interpretation is possible. The first one can be preferred, but the fear in this kind of definition is that there is possibility to determine certain acts to be terrorist acts even though the acts were committed without any such motive, or were committed by a group of people who were fighting for freeing their territory from foreign occupation, or were committed by those who are being persecuted and are left with no option but to resort to it.

However, the modern approach is the combination of both. Usually, the first part of the definition is general and the later part specifies certain acts committed within or outside the state to be terrorist acts. They include all possible kinds of terrorist acts. This part is inclusive so that any newer kind of terrorist activities could also be included. The definitions of the United States, the United Kingdom, Canada, Australia and New Zealand are of this kind. The author is of the opinion that this kind of definition should be negotiated at international level and states should be asked to bring definitions contained in their local legislations in line with this. Towards this end, the definition of terrorism supported by Muslim countries and contained in the OIC Convention can appropriately be amended, without violating the injunctions of the Qur'an and Sunnah, to include certain acts - in the *maslahah mursalah* (public interest) - to be terrorist acts. Muslim countries might not have any objection on it. A question arises here: will it be acceptable

²¹ See Dr. S. P. Rao, "International Terrorism, Self-Determination and National Liberation", in R. K. Dixit and C. Jayaraj (eds.) *Dynamics of International Law in the New Millennium* (New Delhi: ISIL, 2004), p. 115.

²² While opening the session of ASEAN Ministerial Meeting on Terrorism in Kuala Lumpur, Abdullah Ahmad Badawi said that the global effort to combat terrorism would remain arduous if the international community does not commit to a definition of terrorism. See *New Straits Times*, 21 May 2001.

to non-member countries? The answer to this question is that it will be, if it is based on objective criteria suited to all states.

Judicial Solicitude

Although courts could have contributed through their decisions towards reaching a comprehensive definition suited to all countries, but they, as interpreters of law limited their activities only to interpreting and applying terrorism laws on given facts.²³ It is submitted that this attitude of courts failed to provide guidance to the legislature in various states. Justifying this attitude of the courts, Ben Golder and George Williams write that capacity for judicial flexibility does not outweigh the argument for a greater legislative role. Definition containing key features of terrorism has several advantages. These operate with particular strength given several consequences that can flow from the use of the word 'terrorism' when attached to a person, act or organization. The most important role for the legislature is that as peoples' representative and a sovereign democratic forum it can be the best place because to define terrorism is a mixed political and legal matter.²⁴ It can further be argued that in absence of a statutory definition, for comprehend it one will have to look into a gamut of cases; and the effort may be futile in case of lack of uniformity of approach.

In view of this, it will be appropriate to say that for an intricate matter like terrorism, legislature should take initiative to define. Judiciary's role is to evaluate the definition and interpret it properly while applying it. It is notable that the legislature always has the superiority over the judiciary, as it can abrogate any of the judicial interpretations, which restricts or widens the scope of the definition and that is not in conformity of the policy of the government.²⁵ On the contrary, if a judicial endeavour goes co-extensive with government's policy, the law is better understood.²⁶ The author is of the opinion that judiciary can guide the legislature in manifest ways. The Islamic history reveals that on many occasions, Qazis (judges) have guided Ameeris through their decisions. Thus, if Qazis fulfill the qualifications to be a Mujtahid (person who does ijtehad), they can do ijtehad (developing rules on the basis of analogy), or can refer the matter to the Fatawa Committee, if it exists in a state, and can base their decisions on the fatawa (religious ruling) given by the committee. So, in an Islamic legal system also, there is ample opportunity to a Qazi to guide the state on defining terrorism. For Muslim states the OIC definition is acceptable; they will accept it even if it is suitably amended. And if it is based on objective criteria, as stated above, it would be accepted to other states also.

Objects

Terrorism as political violence possibly stems out from its root as a political term applied to the French Revolutionary Tribunals during that country's 'Reign of Terror', with terrorism's political connotations continuing to feature throughout much of its historical development.²⁷ It is also said

²³ The following cases may be referred: *T. v. Secretary of state for Home Department*, [1996] AC 742 (HL); *R. v. Secretary of State for Home Department and Another*, [2002] All ER 327; *R. V. Secretary of State for Home Department*, [2002] EWHC Admn. 644; *Secretary of State for Home Department v. Rehman*, [2003] AC 153 (HL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3; *Fuents v. Canada (Minister of Citizenship and Immigration)*, [2003] 4 FC 249.

²⁴ See Ben Golder and George Williams, "What is 'Terrorism': Problems of Legal Definitions", 27 *University of New South Wales Law Journal* (UNSW Law Journal) 2004, p. 170, at pp. 192-293.

²⁵ Row of legislature and the judiciary in India on Land reform legislations is the best example.

²⁶ In India, the definition of industry was widened enough by the judiciary to include municipal corporations, hospitals and universities within the fold of the definition of the term 'industry'. None of the cases were abrogated by the Parliament.

²⁷ See Mark Burgess, "Terrorism: The problem of Definition", <<http://studies.edentura.ru/centers.cdi/definition>>; Mark Burgess, *A Brief History of terrorism* (USA: Harvard University Press, 1999), p. 11.

that terrorism is inherently and fundamentally political in nature.²⁸ However, in spite of the fact that most of the terrorist activities are being perpetrated for political motives, this view is not so widely accepted. Some reject the element of motive altogether. For them, motive is not an important factor. They concentrate on the cause and effect of terrorist activities that takes lives or destroys properties or both. Thus, Eqbal Ahmad holds the view that motivations make no difference. Likewise, Jessica Stern is of the opinion that the definition of terrorism is not limited to perpetrator or purpose. To Stern, it is the 'the deliberate evocation of dread is what sets terrorism apart from simple murder or assault'.²⁹ Although it is said that individuals are not to be considered as terrorists, there are terrorist organizations, and individuals can be terrorists if they are perpetrating terrorism on the behest of any such organization or prompted by a state. It is argued that if individuals are perpetrating terrorism, they can be charged under terrorist legislations. The author is of the opinion that political motivation is a reason of perpetrating terrorism in most of the cases, but it does not apply in all cases. Therefore, motive is an important factor for defining terrorism.

There is another opinion that terrorism has a motive. It can be political, ideological, or economic, and the activity can be traditional or non traditional like environmental terrorism, consumer terrorism, cyber terrorism or state terrorism. Although it is argued that such a wide connotation will dilute the purpose of war against terrorism, and risks making the term so elastic as to deprive it from its functional meaning.³⁰ Psychological object of terrorism is also material in a large number of cases. People or state is terrorized so that they concede to the demand of the terrorists. In some cases, the sole purpose is to kill or destroy. In some other cases, the purpose is to retaliate. In the last case the motivating factor is revenge. The author is of the opinion that all these factors should be taken into consideration while attempting to have a widely acceptable definition.³¹

In Islam, terrorist acts have to be judged on the basis of motives of its perpetrators, as all human acts are to be categorized as marufat (virtues) or munkarat (vices) on the basis of the motive of doing them. However, all forms of terrorism, as it is understood, is certainly a non-virtuous act and, thus, prohibited in Islam.³² This is because Islam not at all subscribe to kill and terrorized innocent people.

Individual Terrorist

It is widely accepted that terrorism is related to organizations that are perpetrating terrorism for a particular purpose. Individuals can be considered as terrorists when they work for terrorist organizations. To consider a single person to be a terrorist is a debatable issue. For many, he should not be considered as a terrorist and should be dealt with the criminal law of the state. However, some others subscribe to the view that if an individual perpetrates terrorism, using the method that are generally used by terrorists, for any of his own personal reason, including personal pleasure or egoistical ends, should also be considered as a terrorist.³³

The second view is close to the Islamic Shari'ah on terrorism, as on the Day of Judgment, every one will have to give hesab individually. So, any despicable act one has committed individually or collectively will be subjected to punishment.

Means

²⁸ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 1988), p. 14.

²⁹ Eqbal Ahmad, "Terrorism: Theirs' and Ours", in Russell D. Howard, and Reid L. Sawyer, *Terrorism and Counter Terrorism: Understanding the New Security Environment* (Guilford: McGraw-Hill, 2003), pp. 46-53. Jessica Stern, *The Ultimate Terrorists* (Cambridge: Harvard University Press, 1999), p. 11.

³⁰ Adrian Guelki, *The Ultimate Terrorists* (New York: I.B. Tauris, 1998), p. 1.

³¹ Paul R. Pillar, *Terrorism and US Foreign Policy* (USA: Brookings Institution Press, 2001), pp. 13-14.

³² See *infra*.

³³ See Mark Burgess, *infra*.

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Means that terrorists adopt for achieving their object(s) are not constant. The commonly used means now is suicide bombing, which was largely practiced by the Japanese Army during the Second World War and at times practiced by LTTE, including the ones that took lives of two heads of states. Generally, tactics adopted by terrorists do not involve heavy weapons. Those who adopt guerilla warfare tactics generally use heavy weapons. This happens in case of war. But the difficulty arises when terrorist groups also adopt this technique. Another difficulty is the use of biological weapons, and possibility of using dirty bomb or any other such weapons of mass destruction. In view of these, it is difficult to distinguish terrorist means from non-terrorist means.

The position will be the same in Islam also. In Islam terrorism, practiced by application of whatever means, is prohibited.

State Terrorism

For many, there is nothing like state terrorism. For them, terrorism is generally perpetrated by groups of individuals through their members. This is true that around the globe there are hardcore organizations, generally constituted for accomplishing political, ideological, economic objectives or to counter the intimidations and persecutions inflicted to them, and they have adopted the path of terrorism and are engaged in various means of terrorist activities. Nevertheless, a section of intellectuals believe that states are also responsible for escalating terrorism, or are directly or indirectly engaged in terrorist activities. This view can be substantiated when we turn the pages of the history or look at the causes and effects of present international terrorism. Although state terrorism had existed in some or the other form throughout in the past, during the second world war the world experienced two significant acts of state terrorism, large number of Japanese suicide bombers and the horrendous act of dropping of atom bombs on Nagasaki and Hiroshima. Creation of Israel on the Palestinian lands after the Balfore Declaration became the turning point. Ever since the creation of Israel, struggle to liberate the occupied land is continued. The action and retaliation are continual. It is notable in the whole episode that retaliations have hardly been proportionate. This trend became more serious after destruction of nuclear facilities of Iraq by Israel, the Gulf War and the horror of Sabra and Shatila.³⁴ It is submitted that had there been negotiations with concerted efforts made by the world community for bringing about peace in the region rather than reiterating that what Israel has been doing is its right of self-defence, there would have been entirely different scenario. In fact, the West took a lackadaisical attitude and supported wrong principle that 'offence is the best defence'. What Israel had been doing was nothing but acts of terrorism: poor and armless people were very often persecuted, arrested, killed and their properties were destroyed. This kind of attitude escalates terrorism rather than alleviating it. The author is sorry to see no change in the attitude of the West.

In the Vietnam War, thousands of hectares of mangrove forests were destroyed by the American Army presuming that forests were hideouts of Vietnamese Army. This was the clear violation of the principle of 'discrimination' of the law of war, and because of this, a large number of forest inhabitants were terrified and killed by the American bombardments. This can be classified as an act of state terrorism. This mistake was repeated subsequent wars. It is notable that so as to deter warring countries from committing such acts again, in 1977, Environment Modification Treaty (ENMOD) and 1977 Protocol to Geneva Conventions of 1949 were made. In spite of these legal instruments and the principle of 'discrimination' and 'proportionality' of the international law of war, the allied forces destroyed civilian facilities, and the Iraqi Army in first Iraq war used oil as a weapon. Both are some kind of environmental terrorism perpetrated by states. So is the case of using biological and chemical weapons used by Iraq for suppressing Qurds.

After the Afghanistan war, terrorism was dying its own death, because terrorists and states that were supporting them were demoralized and defeated. But the attack on Iraq on the false pretext

³⁴ For the atrocities of Sabra and Shatila, see Shad S. Farooqi, "The forgotten horror of Sabra and Shatia", *New Straits times*, 14 September 2005.

and without support of the UN Security Council, which killed seemingly a large number of civilians and extensively destroyed civilian properties and crippled infrastructure, provided a justification to rejuvenate their struggle. It is more than obvious that the present state of terrorist activities in and around Iraq, including the horrendous acts of terrorism experienced in Madrid and London may have links with the Iraq war. The terrorist activities in Pakistan, including the deadly attack on the Marriot hotel of Islamabad, may have link with the de facto occupation of Afghanistan. Who is responsible for the present conditions in Iraq and Afghanistan? If it is true that Iran is helping one of the two religious groups in Iraq, what is it? If it is true that terrorist groups are being funded by some states, what is it? All these can be classified as state terrorism. War against terrorism has always been counterproductive. Here a question arises: Are the US, the UK and their allies are not responsible for terrorism? For many, the answer will be positive. Some others consider the attack on Iraq and killings of innocent people, when most of the Saddam's guards had melted away and the attacking forces were not facing any effective resistance, tantamount to terrorism.³⁵ Nevertheless, there were grave violations of the law of war and Geneva Conventions. In the continuous chain deaths occurring in Iraq, deaths caused by the US Forces and their allies are not insignificant. Moreover, the responsibility of the present state of affairs in the country is on them because the countries that attacked Iraq did not make proper calculations of the law and order situations in the aftermath of the war and did not pour in enough forces and support personnel. Excessive use of force for suppressing any movement, ideological or economic, within a state or supporting or conniving communal riots can also be labeled as state terrorism. Excessive use of force against Maoists in Nepal and in some other states are opt quoted examples by some of the western countries and Human Rights Watch. The problem is that many countries do not believe in state terrorism. They oppose the definition that attempts to consider such state activities tainted with terrorism.

In Islam, sovereignty of the state is with the Allah (s.w.t.). There is, thus, a representative government run on the basis of divine injunctions contained in the Qur'an and Sunnah. There can be man-made laws, but these laws for their validity have to be in conformity with the primary source of law. The primary purpose of the state is good to its people and cordial relations with its neighbors. It can be inferred from the divine scheme that no state can, directly or indirectly, be involved in terrorist activities. If a state is involved in such activities, the ruler will be accountable for it.³⁶ No state is allowed, in Islam, for establishing its might on another state, or occupying it for some ulterior objective. State is duty bound to protect the Islamic character of the state and to protect it from any foreign aggression. If an Islamic state has been attacked, holy war (jihad) is the option. However, at any point of time, for establishing peace, compromise (sulh) is a solution. Thus, those, who fight for protecting their country from a foreign aggression or for taking it back, are, in fact, keeping up the Islamic precept. They cannot be called as terrorists.

Pre-emptive strikes

According to international law, states have an inherent right to defend themselves against armed attacks. This is justified on the ground of self-defence.³⁷ The right is based on necessity and

³⁵ See *New Straits Times*, 10 -11 September 2005.

³⁶ See S.A. A' la Maududi, Editor Khurshid Ashmad, *The Islamic Law and Constitution* (Lahore, Islamic Publications, 1983); S. A. A' la Maududi, *Islamic State and Constitution* (Lahore, Islamic Publications, 1990) 10th Edition.

³⁷ Collective self-defence is allowed only when there is a request from the attacked state and supported by the United Nations. 1999 Gulf War is the example. This may be noted that for the Gulf War the UN Security Council invoked Article 51 of the UN Charter and passed the Resolution 671 for collective self-defence. It takes place when one or more than one states joint to provide defence to an ally under armed attack.

limited by proportionality.³⁸ It presupposes the absence of any alternative means for protection of fundamental rights of the state. Article 51 of the UN Charter, grants the right of self-defence. But this has wrongly been imagined to provide the basis for pre-emptive strikes in view of serious and eminent danger of attack. States' right to resort to force under the Charter is only until the Security Council has taken the measures necessary to maintain international peace and security, thus, restricting the extent of availability of the right. There are two prominent interpretations of the applications of the Article: First, Goodhart says that the right is available as a matter of right, the Charter only limits the right. Second, Kelsen is of the opinion that the right becomes available only when there is an armed attack. The International Court of Justice (ICJ) in the Nicaragua Case held that self-defence was a pre-existing right of customary nature. The supporters of the first view are of the opinion that the right arises in case of attack or serious and imminent danger of attack, which may arise by posting large number of force along the border or by sending bands of force into the territory of another country, because this can be a case of indirect armed attack. But in all cases, the serious and eminent danger of attack must be proved before exercising military activities for self-defence.³⁹ The author is of the opinion that the right is available only in case of armed attack with the requirement for invoking Article 51 that the response of the defending state must be 'close in time' or 'immediate response to attacks'.⁴⁰ Article 2(4) of the UN Charter has clear prohibition on threat or use of force. Michael Bothe and A. M. Frankfurt have written: "Lawful self-defence requires the actual existence of an armed attack, or a situation to be considered as equivalent to an armed attack. A threat may be so direct and overwhelming that one cannot require the victim to wait to act in self-defence until the attack has actually started. This principle of necessity and immediacy is still part of customary international law."⁴¹ If right of self-defence is liberally interpreted as the United States is doing for justifying pre-emptive strikes, which will be sheer misinterpretation of Article 51 of the UN Charter; and if it is accepted, no state will be safe.⁴² Pre-emptive strike can never be self-defence. It will itself be no less than an armed attack.⁴³ The doctrine of pre-emptive strike practiced by the United States and Israel for

³⁸ This is based on Caroline Case, 29 BFSP 1137-8. For a detailed analysis of the case, see R. Y. Jennings, "The Caroline and Acleod Cases", 32 *American Journal of International Law* (AJIL), pp. 82-89.

³⁹ For the contrary view, see J. L. Hargrove, "The Nicaragua Judgment and the Future of the Law of Force and Self-defence", 81 *American Journal of International Law* (AJIL), 1987, p. 135; Justin N. B. Frank and Javid Rehman, "Assessing the Liability of the Attacks by the International Coalition Against Terrorism: An Enquiry into the Self-Defence Argument Under Article 51 of the Charter", 67 *Journal of Criminal Law* (Jo. C. L.), 2003, p. 415, at p. 418.

⁴⁰ This may be noted here that in the *Nicaragua case* ICJ held that, "It may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across international borders, but also the dispatch of armed bands of terrorists into the territory of another state." The necessary condition that can be noted here is 'the dispatch of armed bands of terrorists', which is not against the authors' view.

⁴¹ "Terrorism and the Legality of Pre-emptive Force", 14 *European Journal of International Law* (EJIL), 2003, p. 227.

⁴² According to Article 31 of the Vienna Convention on Law of Treaties, provisions should be given simple meaning in the light of its object and purpose. It has been rightly said by Micheal J. Glennan that the United States had wrongly made the case for pre-empting threats that were not immediate, but merely prospective, as in the case of Iraq. See Micheal Glennan, *New York Times*, 21 Nov. 2002. This has been agreed by Rahmatullah Khan. See Rahmatullah Khan, "The War on Terrorism", 45 *Indian Journal of International Law* (IJIL), 2005, p. 1.

⁴³ See Y. Dinstein, *War, Aggression and Self-Defence*, (London: Cambridge University Press, 1988), p. 184; Randelzhofer, "Article 51", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd Edition, 2002, p. 803; Kirgis, "Pre-emptive Action to Forestall Terrorism", *ASIL Newsletter*, July/Sep. 2002 at p. 5.

their national security, thus, is illegal and an unacceptable expansion of the right of self-defence.⁴⁴ It cannot be justified as a customary international law also.⁴⁵ It will be even worse if the scope of pre-emptive strike is widened in the name of 'long war' on global terrorism. It will result into a sense of insecurity among many countries of the world. The situation of Iraq was different than Afghanistan.⁴⁶ There was no attack nor an eminent danger of attack by Saddam Hussain, as he did not have weapons of mass destruction. The UN inspectors before the attack said this. Colin Powell has admitted this in his recent interview given to ABC.⁴⁷

It can very well be concluded that there is nothing like pre-emptive strike, which is justified under the 'Caroline Principle', in international law, as it can neither be justified under the UN Charter nor under the customary international law. If it is practiced, it will be an illegal act, and will itself amount to a kind of state terrorism. This should be included in a comprehensive definition. But the problem is that this might have opposition of the United States and its close allies.

According to the traditional Sunni view, for a war, there has to be a just cause viz, the imperative to extend the boundaries of the territory of Islam. For this, invitation has to be sent by a Muslim ruler to a non-Muslim ruler either to accept Islam or to pay tribute. There can be a war on refusal and that has to be fought according to the Islamic values.⁴⁸ But according to Shi'ite view, use of force is allowed only for defa' (defence), when war is imposed by hostile and aggressive political forces.⁴⁹ This view is fairly common among the contemporary Sunni Ulama (religious experts), especially of Egypt. To support this, Mahmood Sultan in *Qur'an and Fighting* (originally published in 1948) for example, presents the thought of a formidable Sunni scholar, eventually the Shaykh al- Azhar, and argues fighting cannot be an essential part of the Islamic mission...it can be justified only in cases of defence...to stop aggression, to protect the mission of Islam, and to defend religious freedom. The author agrees with this reformist approach.⁵⁰ However, from the practices of the Prophet, it can be inferred that a Muslim country can attack another country in case of an eminent danger of attack by that country, which can be established on facts. This is

⁴⁴ See Joan Fitzpatrick, "Speaking Law to Power: The War against Terrorism and Human Rights", 14 *European Journal of International Law* (EJIL), 2003, p.241; P. Glennon, "The Fog of War: Self-Defence, Inherence, and Incoherence in Article 51 of the United Nations Charter", 25 *Harvard Journal of Law and Public Policy* (Harv. J. L. & Pub. Pol.), 1002 539; Emanuel Gross, "Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defence: Human Rights Versus the State's Duty to Protect its Citizens", 15 *Temple International and Comparative Law Journal* (Temple Int'l & Comp. L. J.), 2001, p. 195. This may be noted here that Tony Blair, in one of his speeches delivered in March 2004, demanded for amendment of the international law for legalizing pre-emptive strikes. It means he accepts that under the present law, it is illegal.

⁴⁵ The rules about pre-emptive strike were spelt out as long ago as 1837 in a dispute between Great Britain and the United states involving a vessel, The Caroline. This right was made available if it could be shown that "necessity of self defence is instant, overwhelming and leaving no choice of means and no moment of deliberation." This is known as 'Caroline Principle'. Since then, Israel and the United states have resorted to it several times. This principles has not been accepted a principle of customary international law.

⁴⁶ The United States and the United Kingdom to surprise of the world did not even wait for the decision of the Security Council. This shows that the attack was pre-determined.

⁴⁷ Mr. Powell said that his speech in February 2003 to the UN making a case for war was a "painful blot on his record". See *New Straits Times*, 14 September 2005.

⁴⁸ See John Kelsey, *Islam and War- A Study in Comparative Ethics* (Kentucky: John Knox Press, 1993), pp. 35-36.

⁴⁹ See Abdulaziz Sachedina, "The Development of Jihad in Islamic Revelation and History", in James Turner Johnson and John Kelsey, *Cross, Crescent, and Sword* (New York: Greenwood Press, 1990).

⁵⁰ Mahmud Shaltut, *The Qur'an and Fighting*, in *Jihad in Mediaeval and Modern Islam* (translated by Rudolph Peters) (Leiden: E.J. Brill, 1977) at p. 51.

in conformity with the Qur'anic authority to fight given to those who were driven out of their place.⁵¹ Had it not been there, some men would have suppressed others.⁵²

In view of this it can be said that an Islamic state has to have cordial relations with other states and to fight against any state or group of people to defend its territory and its people only when there is an attack by the other state. Otherwise, it will be considered as an act of aggression, which is not allowed. It can, thus, be said that Islam does not subscribe to pre-emptive attack. More appropriately, almost all Muslim states are bound by the customary international law. They also have to follow treaty norms of the treaties to which they members, because in Islam, there is a Qur'anic injunction to all keep their promises.

Self-Determination

In many countries, secessionist activists have adopted the path of terrorism and justify their movements on the basis of the international principle of self-determination. They will be considered as terrorists and will be governed by specific legislations made for abatement and control of terrorism. We know that the principle has limited scope of decolonizing a colonized state. After the Second World War, based on this principle, a large number of countries were decolonized. A secessionist movement, especially armed rebellion, cannot be justified on the principles of external as well as internal self-determination. If the principle is applied today, insurgency will get encouragement and sovereign states might break. However, for a justifiable cause and for a peaceful co-existence, based on peace agreements between activists and the government, within the constitution, some kind of autonomy can be allowable. There are many examples of this. In exceptional cases, where activists perpetrate terrorism and continue perpetrating it and don't negotiate peace, only they can be considered as terrorists and their activities will be covered by a comprehensive definition of terrorism.⁵³ This is because there are some genuine insurgency movements and they have not resorted to terrorist acts.⁵⁴ But the problem here is that countries that support armed rebellion tainted with terrorism will oppose the attempt of including such acts within the definition of terrorism.

In Islam, there cannot be a state within a state. Thus, all kinds of secessionist movements are illegal. They are considered to be rebellious activities and have to be suppressed by application of force. However, if a territory is illegally occupied by another country, the people will have right to fight for the freedom of their territory from illegal occupation. This will be allowed and their activities will not be tainted as terrorist activities, as long as they do not kill innocent people. This is notable that even in case of rebellion, revolution or people's war (civil war), which are known as 'irregular war', the rules of war have to be observed, but rebellions have to be dealt with severely. In a civil war, Ali the Caliph took a soft approach against those Muslims who fought against him. Al-Shaybani reports that Ali the Caliph said in the Battle of Camel:⁵⁵ "Whoever flees (from us) shall not be chased, no prisoners of war will be killed, no wounded in the battle shall be dispatched, no enslavement of women and children shall be allowed, and no property of a Muslim shall be confiscated".⁵⁶

⁵¹ See Abdullah Yusuf Ali, *The Meaning of the Holy Qur'an* (Brentwood: Amanah Corporation, 1992), pp. 832-833.

⁵² See the Qur'an, *Al-Haj* (20):39-40.

⁵³ See P. S. Rao, "International Terrorism, Self-Determination and national Liberation", in R. K. Dixit and C. Jayaraj (eds.) *Dynamics of International Law in the New Millennium* (New Delhi: ISIL, 2004), p. 115.

⁵⁴ The difference between simple terrorists and insurgents is that the former use violence and kill innocent people to register their grievance, often in the hope that it can lead to some type of change in the policies of their enemies, while the later simply seeks to over through and replace the government or to get back their illegally occupied territory.

⁵⁵ It was a civil war between two Muslim groups.

⁵⁶ Al-Shaybani, *Kitab al-Siyar al-Kabir*, translated by Majid Khadduri, *the Islamic Law of Nations* (Baltimore: John Hopkins University Press, 1966), sec. 1372.

International Terrorism

We have noted above that terrorism has now engulfed the whole world. Whatever may be reasons, it is evident that many terrorist organizations are operating now borderless. Their bases are not known and their targets are unpredictable. The American definition of 'terrorism' has attempted to bring such international terrorist activities within the scope its. The Australian definition also prescribes for taking action under the Australian law against those who cause harm to Australian nationals or their properties. Cross-border terrorism is also a kind of international terrorism, which is blighting relations of many countries, including the India-Pakistan. This category of international terrorism can be most dangerous if because of that war between two countries takes place.⁵⁷ The country that supports such activities, opposes any definition that includes this.

We have already stated above that international terrorism or cross border terrorism are prohibited in Islam. This is also accentuated from the below discussion.

TERRORISM AND ISLAM

Islam is Against Terrorism

Objectively speaking, all religions are for peace, amity and peaceful co-existence of followers of all religions. They all disapprove hatred, enmity and violence.⁵⁸ In Islam, Qur'an and ahadith (traditions of Prophet Muhammad, hadith is singular of ahadith), which are based on divine wisdom, clearly establish them. Islam is a religion of peace co-existence, harmony and tolerance. It disapproves all kinds of terrorism and upholds equality, human dignity, non-aggression, tolerance, non-violence, and assistance to those who are in distress. The Qur'an says, "...if any one slew a person...it would be as if he slew the whole people. And if any one saves a life, it would be as if he saved the life of the whole people..."⁵⁹ Although plants and animals are subservient to man, Islam permits to take benefits from them and prohibits their wasteful use. Islam ordains to be nice to them and maintain congenial relations with them.⁶⁰ In spite of this fact, it is unfortunate that Islam is identified with terrorism. It is sheer misrepresentation when Muslims inflict strikes, and BBC and CNN call them as Islamic terrorist attacks and identify perpetrators with jihadists. This attitude can be counterproductive; innocent Muslims might be misguided by it and might tend to Muslim terrorist groups.

Considering terrorism as Jihad is nothing but, ignorantly or deliberately, projecting a diversely opposite picture of the religion. Jihad (holy war)⁶¹ has generally been misinterpreted. The word has wide connotation. It means intense efforts, total endeavour, and strive hard towards spiritual and moral struggle, not to be guided by ego, to be God conscious (taqwah), setting forth good conducts (marufat, virtues) and abstain from prohibited and disliked conducts (munkarat, vices), excelling in all areas of knowledge that are for public interest. It also includes conflict with enemies in circumstances where believers are persecuted and their existence is endangered.⁶² A

⁵⁷ India and Pakistan had that kind of situation in 2002.

⁵⁸ C. G. Weeramantry, "Religion, Law and Human Rights", 6th Professor Emeritus Ahmad Ibrahim Memorial Lecture, Organized by Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia, and delivered at the Crown princess Hotel, Kuala Lumpur, 23 July, 2005.

⁵⁹ Qur'an, *al-Maeda* (5): 32.

⁶⁰ See Abdul Haseeb Ansari and Parveen Jamal, "Towards an Environmental Jurisprudence", *Religion and Law Review*, vol. X-XI, 2001-2002, p. 79.

⁶¹ According to Islamic traditions, the 'great jihad' is the struggle with one's own heart, the attempt to bring oneself into accord with the will of God. This is because whatever a man does are for the pleasure of Allah.

⁶² Henry S. Williams, "Terrorism and Religions", < www.religion_online.org/showarticle.asp?title=2457 >

Yusuf Ali, while commenting on Sureh Taubah, ayah 20, aptly writes, "Here is a good description of jihad. It may require fighting in God's cause as a form of self-sacrifice. But its essence consists in: 1. true and sincere faith; and 2. earnest and ceaseless activity, involving the sacrifice of life and property in the service of God. Mere brutal fighting is opposed to the whole spirit of Jihad..."⁶³ It is clear that quoting ayah (verses) to justify terrorism is entirely a wrong notion.

The most pertinent hadith, which clearly demonstrates that Islam is against terrorism, is: "And I dislike using any kind of intimidation against anybody."⁶⁴ On the contrary, he (saw) visited Jews when they were sick, protected their personal law in the Constitution of Medina, and preached to be nice to neighbors, irrespective of their religion.⁶⁵

Islam teaches restraint in the face of provocation, and supports for forgiveness. Qur'an says, "The recompense for an injury is an injury equal thereto: but if a person forgives and makes reconciliation, his reward is due from God ..." ⁶⁶ Likewise, Tirmizi records a hadith, "Once a person from Quraysh broke a tooth of another person from Ansar camp. The victim then made a petition before Mua'viah the khaliph for seeking justice. The accused requested the khaliph to be soft towards him. But Mua'viah was not agreeable to that. A senior companion of the Prophet by the name of Abu al-Darda', who was sitting beside the khaliph said that on one occasion the Prophet said that if a person forgave another person for a crime commit to him, he would be rewarded greatly. Upon this, the victim forgave the accused. The khaliph showed his happiness on this and ordered the victim to be recompensed."⁶⁷ It is also worth noting that Islam encourages for justice and compassion and forbids oppression. Justice is considered as a sacred trust and the best among all virtuous deeds. Oppression is opposite of justice. This can be inferred on reading various ayahs in the Qur'an pertaining to justice.

Those who identify Islam with terrorism generally misinterpret and misquote ayah 191 of chapter II of the Qur'an which reads, "And slay them wherever you catch them, and turn them out from where they have turned you out; for tumult and oppression is are worse than slaughter..." This ayah has to be read and interpreted only in the context in which it was sent. Even after the migration of Muslims from Makkah (hijrah) to Medina, the oppression and persecution by Makkans continued. They also looted the business caravan of Muslims. Muslims were hesitating because Makkans were close relatives of those who had migrated to Medina (muhajerun). This ayah encouraged Muslims to fight giants them. This interpretation gets support from ayah 190 of the same chapter that reads, "Fight in the Cause of God those who fight you, but do not transgress limits..." The irony is that in spite of the clear indication of the context by the commentators of the Qur'an to which the ayah 191 refers to, orientalist, whose mission is to prove that Islam encourages terrorism, have misinterpreted it. The irony is applying Qur'anic verses, which have been descended to meet war situations, during peacetime. Ayah 191 of chapter II is to be applied only during war situations; it cannot be given generated application. Muslims, who are perpetrating terrorism in preparing self-styled jihadists, also misinterpret for motivating innocent Muslims for militancy.

It is, therefore, suggested that all Qur'anic ayah and ahadith must be read and interpreted in their relevant contexts. On the contrary, they are going to be misinterpreted, resulting in undesired results. It is the responsibility of ulama and jurists to put forth correct Islam. It is sine qua non for fighting Muslim militancy.

In fact, a vast majority of Muslims are against all kinds of terrorism. Those who are perpetrating it constitute small minority. There is a kind of civil war among them. Terrorism will end only when the right-minded majority wins this war. In view of this, it is suggested that all states that

⁶³ See The Holy Qur'an , Translation and Commentary, note 1270.

⁶⁴ Bukhari, *Sahih* (Beirut: Dar Ihya' al-Turath al-Arabi, 2000) vol. 5, p. 644, *hadith* no. 5432, ; Muslim, *Sahih* (Dar al-Ma' rifah, Beirut, 1997), vol. 4, p. 578, *hadith* no. 2189.

⁶⁵ There are numerous of Qur'anic *ayah* and *ahadith* on these.

⁶⁶ The Qur'an, *Shura* (42): 40.

⁶⁷ Tirmidhi, *Sunan* (Beirut: *Dar Ihya' al-Turath al-Arabi*, 1995), vol. 4, p. 14, *hadith* 1397.

are waging war on terrorism must provide all kinds of strength, individually and collectively, to the majority group.⁶⁸ If it is not done, the recently renamed 'long war' on global terrorism can turn into an undifferentiated campaign against Muslim in general and Muslim insurgencies, wherever they emerge, in specific. This will be a great mistake. We cannot target any insurgency movement just because al-Qaeda helps it. Some Muslim causes may be just and deserve international support. In view of this it is suggested that the United States should pick its fight very carefully.⁶⁹ The best example is Muslim insurgency of Moro Islamic Liberation Front in Mindanao, Philippines. This has nothing to do with the West. There has been peace talk between insurgents and the Government of Philippines. A conventional military approach might engulf whole southern Philippines. This problem can be solved through negotiations. In the peace process West can help. Kit Collier and Malcon Cook have rightly written that US, Australia and other countries must pick up political slack and build the government's capacity to deliver a sustainable peace agreement for Mindanao.⁷⁰ A long-lasting peace can be achieved within the within the constitutional framework by granting an agreeable autonomy to the region.

Madarasah are for Religious Teachings

Madarasah is a school where religious teachings are given to Muslims. However, in Pakistan, some of them bordering with Afghanistan have been allegedly blamed for teaching militancy rather than teaching Islam. This is a misuse of Madarsahs for sinister purposes, which is tarnishing the image these religious institutions. Those who are involved in it find it easy to distract and motivate those young people who have seriously suffered by the war on terrorism. As a part of clean up activities, General Musharraf ordered for registering all Madarasahs and for scrutinizing their syllabi.⁷¹ This kind of activity has not been reported in India. In India, Madarasahs, notably Deoband, are actively participated in the independence movement, and ever since then they are busy in imparting religious teachings only.

Terrorists Are Not Martyrs

We may conclude that it is wrong to say that Islam supports terrorism. Extremism is clearly prohibited by it. So-called jihadists are not actually jihadists. Islamic Scholars condemn terrorism.⁷² Those who die or kill themselves while perpetrating terrorism are not martyrs.⁷³ Some have made distinction between the suicide bombings of those who are trying to defend themselves from occupiers, from those who kill civilians for the sake of perpetrating terrorism. For them, it is something different.⁷⁴ The author is of the opinion that it is the duty of Muslim Scholars to tell the world about the true Islamic view on terrorism, jihad and martyrs. If necessary, inter-faith dialogues should be organized so that the theory of conflict of civilizations is falsified.

It is clear from above paragraphs that the Islamic approach of terrorism is the same as the western perception about it. It has to be stopped by all means. Identifying Islam with terrorism and considering terrorists as jihadists will be a great mistake. Western countries should provide all kinds of help to the vast majority of right-minded Muslim so that they become empowered enough to counter the fallacious propaganda of those who are perpetrating terrorism.

PRISONERS OF WAR

⁶⁸ For similar view, see Joseph S. Nye, "The soft-power secret of defeating terror", *New Straits Times*, 2 May 2006.

⁶⁹ James Dobbins, "Picking the right fight against the global terror", *New Straits Times*, 4 May 2006.

⁷⁰ "Closing Mindanao's Sanctuaries of Terror", *New Straits Times*, 6 May 2006.

⁷¹ See *New Straits Times*, 13 September 2005.

⁷² See *New Straits Times*, 14 August 2005.

⁷³ See *New Straits Times*, 17 July 2005.

⁷⁴ *Ibid.*

Taking Prisoners of War

It is a general rule that enemy soldiers can be captured during a war and made POWs. Non-combatants, while helping the enemy army in any ways can also be captured and made POWs. According to the Geneva Conventions,⁷⁵ the following, who have fallen into the hands of enemy, can be taken as prisoners of war: members of the armed forces of a party to the conflict; militia or volunteers forming part of that military group operating with or outside their territory; members of armed forces who profess allegiance to a government or an authority not recognized by the detaining power; civilian associates of the armed forces; crew members of a merchant ship or civil aircraft; and inhabitants of non-occupied territory, who on the approach of enemy spontaneously take up arms to resist the invading forces.⁷⁶

After the war is over, there has to be no captures in the name of enemy combatants, and thereafter making captives as POWs. In case of doubt or so long their status of captives is not determined, they have to be considered as POWs. This rule of customary international law and explicitly incorporated in the Geneva Conventions is being gravely violated. Many individuals, against whom there exists no proof of being enemy soldiers or helping enemies during war in any way, have been apprehended and put in detention camps without giving them POW status.

In Islam, the law on becoming a prisoner is clear and the same as set out in the IV Geneva Convention. Enemy soldiers, and those who are helping them, including women and children, can be taken as POWs. Allah (s.w.t.) ordains in the Qur'an, "It is not for a prophet to have prisoners of war until he has thoroughly subdued the land (enemy)."⁷⁷ It means before making POWs the enemy must be subdued. It has been re-iterated as: "If you meet in battle those who disbelieve, smite their necks. Then, if you have thoroughly subdued them, bind a bond firmly, so there will be a time for either generosity or ransom for them until cessation of the war."⁷⁸ It is rightly said that the second ayah does not abrogate the ruling of the first one, as both convey essentially the same thing.⁷⁹ This view is supported by Sheikh Rashid Rida in his commentary of the Qur'an entitled *Tafsir al-manar* in these words: "The gist of these verses is that it is not the tradition of the prophets nor of those who follow them to have prisoners of war whom he ransoms or releases except after gaining some ascendancy over the enemies of Allah."⁸⁰

It is clear that Muslim commanders have to fight until the enemies are subdued. If an enemy fighter embraces Islam during the war without any compulsion, he will neither be killed nor taken as a POW. This is because there is no compulsion in religion. Once a person embraces Islam, he will no more remain an enemy pertaining to that war. Once enemy combatants are captured as POWs, they will not be pressurized to embrace Islam.

It is notable that Islamic law of war and POWs is based on divine wisdom. Most of the Islamic rules are in conformity with Geneva Convention and Anti Torture Convention (see *infra*). Some rules are not in conformity with them. These rules are not applicable now because as a member of these treaties they will be bound with the norms enshrined in them. According to the *siyar*

⁷⁵ There are four Geneva Conventions. The I Geneva Convention was re-affirmed by the II Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces. The III Geneva Convention Relative to Treatment of Prisoners of War followed the second one. The fourth Geneva Convention is Relative to the Protection of Civilian Persons in the Time of War. It also re-affirms the three previous Conventions. The user of 'Geneva Conventions' refers to the IV one, which re-affirms the previous three also.

⁷⁶ See Article 4 of the Convention.

⁷⁷ The Qura'n, *al-Anfal* (8): 67.

⁷⁸ The Qura'n, *Muhammad* (470): 4.

⁷⁹ See Sheikh Salman al-Oadah, "Who is there for Our Prisoners of War?" (Part 2 of 3), at <www.islamtoday.com>

⁸⁰ *Ibid*, p. 2. Also see Syed R. Hassan, *The Reconstruction of Legal Thought in Islam* (Lahore: Law Publishing Company, 1974), p. 171.

(International law) of treaties, as derived from Islamic law of contract, Muslim states as a member of treaties will be bound with them.

Illegal Detentions

We know that most of 558⁸¹ detainees of the Guantanamo Bay were not captured from the war zone. They were captured elsewhere. Some of them were brought to the Guantanamo Bay on certain incentives given to the states which captured them. They are being detained there as enemy combatants for years without granting them the POW status and without producing them before a competent court.⁸² Their fundamental human right to meet with their family members and the access of human rights bodies like Amnesty International is denied. We have already stated above that in case of doubts, Geneva Convention applies and they get all rights, including those, guaranteed by the Convention. The law clearly demonstrates that detainees can either have the POWs status or they can be considered as an ordinary criminal. In the second situation, they should be presented before courts of competent jurisdiction within the shortest possible time and should be treated according to the decision of the courts; or they should be freed.⁸³ The United Nations and Britain, Germany, Denmark and several human rights groups have urged the US to close the detention camp.⁸⁴ President Bush forestalled the Europeans during June 21-22, 2006 EU-US Summit by raising the issue of Guantanamo Bay saying that he understood their concerns and expressed his deep desire to end the programme. He said, "He would like to end the Guantanamo. I would like it to be over with."⁸⁵ In spite of this, detainees are being considered as enemy combatant and are being kept in detention. Even if they are so, their rights to access to justice cannot be denied.⁸⁶ The Supreme Court of the United States has categorically accepted this right of the detainees of the Guantanamo Bay.⁸⁷ In the light of these decisions, we can say that detainees at other places, secretly or openly, will also have the same right. These cases have provided impetus to detainees to go to the High Court. Over 200 cases have already been filed. Recently Chinese detainees are planning to go to the High Court.⁸⁸

In the light of the US Supreme Court's *Rasul v. Bush* case,⁸⁹ where the Supreme Court decided that the US court system has the authority to decide whether foreign nationals held in the Guantanamo Bay were rightfully detained. The Court further held that District Courts had the jurisdiction to hear habeas corpus writs of the detainees of the Guantanamo Bay. In view of this, the US Government on 7th July 2004, created the Combatant Status Review Tribunal (CSRT), a body composed of three noncommissioned officers, to examine the legality of detainees.

⁸¹ This figure has recently been released by the Pentagon. Originally, the figure was more than six hundred. Of them, some have been released. See *The Star*, 21 April 2006.

⁸² In the detention camps of the Bay, foreign citizens are kept. They are terrorist suspects arrested and brought from different parts of the world. American citizens are in the US jails.

⁸³ This has been said by the UN- Economic and Social Council, Commission on Human Rights, Sixty-second Session, E /CN.4/2006/120. After the suicide committed by three detainees at the Guantanamo Detention camp, has ignited new calls to shut down the detention camp. Saudi Arabia said it was stepping up efforts to free all Saudi detainees. Waleed al-Tabtaie, a former Member of Parliament, said that the US should release the prisoners or give them fair trials. See *New Straits Times*, 13 June 2006.

⁸⁴ See *New Straits Times*, 13 June 2006.

⁸⁵ *New Straits Times*, 23 June 2006.

⁸⁶ Joan Fitzpatrick, footnote 44, at p. 241.

⁸⁷ In *Hamdi v. Rumsfeld: US*, 542 US 570 (2004), the Supreme Court of the United States held: "... We hold that ..., due process demands that a citizen held in the US as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker." At pp. 14 -15. In *Rasul v. Bush*, and *Al Oadah v. US* (consolidated), 542 US 466 (2004), the Supreme Court said that the right to *habeas corpus* is not dependent of citizen status. The detainees, therefore, were free to bring suit challenging detention as unconstitutional. At pp. 4-16.

⁸⁸ See 17 January 2006, *the Washington Post* at: <www.Washingtonpost .com>

⁸⁹ 542 US 466 (2004)..

CONTEMPORARY ISSUES IN TERRORISM AND THEIR ISLAMIC...

Thereafter, the United States District Court dealing with the habeas corpus petitions of the Guantanamo Bay rules that the CSRT proceedings “deny fair opportunity to challenge these incarcerations” and thus fail to comply with the terms of the Supreme Court ruling given in Rasul case.⁹⁰ The legitimacy of the CSRT was challenged in Hamdan v. Ramsfield⁹¹ in the US Supreme Court and it was expected that the court would give its judgment on it within the year 2006.⁹² The decision has come now and the Court has decided that the Bush administration had no authority to order for establishing such tribunals, as it contravened the Geneva Conventions. In a 5-3 decision the court warned the Bush administration saying that it had no ‘blank cheque’ to decide how to try terror suspects. More appropriately, under the Geneva Conventions, Hamdan, as a prisoner of war, was entitled to a court hearing that followed the same procedures. The Bush administration is now looking for means to avoid the effect of the Court’s verdict. Professor George Fletcher writes that the Bush administration is now left with an embarrassing position. It does not want to prosecute the Guantanamo detainees in American courts, but it is unlikely that it can prosecute them under the law of war as interpreted in the Hamdan case.⁹³ The Bush administration is now looking for means to avoid the effect of the Court’s verdict by any suitable means.⁹⁴ The Government has already established the Administrative review Board for annual review of detentions. It is submitted that this also will not be in conformity with the Supreme Court’s decisions.

On 17 October 2006 President Bush signed Military Commissions Act 2006, which authorizes tough interrogation of terror suspects and smoothing the way for their trials before military commissions. The Act was passed just six weeks after he acknowledged that the Central Intelligence Agency had been secretly interrogating suspected terrorists overseas. It is notable that the Act reaffirms the US plan to try terrorist suspects before military tribunal rather than regular courts. The American Civil Liberties Union has registered the following comments on it: 1. It does not protect due process; 2. It fails to meet international treaty obligations.⁹⁵

On 12 June 2008 the Supreme Court of the United States took even a tougher stand in Boumediene v. Bush.⁹⁶ By 5:4 majority, the Supreme Court reiterated its view that the Federal Courts have the jurisdiction to hear the cases of detainees. Justice Anthony Kennedy rejected the Bush administration’s argument that prisoners could be held for years without a fair process for assessing evidence against them. It means that the Federal Courts - which are equipped with the procedures necessary to protect sensitive national security information - will now be able to examine the basis for detainees’ claims that they are wrongly held. In reading its decision the Court rejected the administration’s assertion that the procedure established in the Detainee Treatment Act 2005 and the Military Commissions Act 2006 were adequate substitute for habeas. The Boumediene ruling is based on the U.S. Constitution, unlike the decision in Rasul u. Bush, which could make it more difficult to overrule by legislation. Although Attorney General Michael Mukasey said that the ruling would not affect the on-going trials at the Military Tribunal, in view of this decision the credibility of the trials at the Military Tribunal has become doubtful. The United States has now started either freeing and sending detained to their home country to face trial there. It is better if the detainees are tried in their home country provided the United States provided evidence against them. This case has given a sigh of relief to those human rights groups which have been lamenting for long about illegal detentions that gravely violated the Geneva

⁹⁰ See the US District Court for the District of Columbia, decision 16 January 2005 in *re Guantanamo Detainees*, 355 F. Supp. 2nd 443, at pp. 468-478.

⁹¹ 548 US 557 (2006)

⁹² See *New Straits Times*, 13 June 2006.

⁹³ “Beginning of the end for Guantanamo Bay”, *New Straits Times*, 20 July, 2006.

⁹⁴ See *New Straits Times*, 1 July 2006.

⁹⁵ See *New Straits Times*, 18 October 2006.

⁹⁶ 553 US 655 (2008).

Conventions and the Due Process rule. It will certainly give rise to a number of cases filed by them to see the detainees free.

In spite of these cases, the brutal interrogations and torture of detainees is continued. This has been stated by Sami al-Hajj, an Al Jazeera cameraman.⁹⁷

The Islamic law about POWs is clear. In Islam, there can be two categories of detainees pertaining to a war: one, who had committed a crime for which they could be penalized; and the second, who are simply POWs. So far the first category is concerned, they have to be indicted and penalized accordingly, including death penalty. If the heinous crimes committed by them are already known and for that they deserve death penalty, they can be executed without subjecting to any trials. In such an exceptional situation of war crimes, Prophet Muhammad (s.a.w.) gave such ruling against some POWs. In the Battle of Badr 70 enemy soldiers were captured. Three of them, namely Uqba ibn Abi Ma't, An-Nadr ibn al-Harith and Tu'aymah bin Udday, were executed.⁹⁸ He also approved the execution of all of Banu Qurayzhas for breaking the peace treaty and pledge to fight against any outside enemy and instead joined the enemy forces. It is notable that although as the head of the state it was prophet's job to conduct the trial, he made Sa'd bin Mu'adh to be the arbitrator. Sa'd gave the award that their men be executed and the Prophet (s.a.w.) enforced the verdict.⁹⁹ From this, we cannot draw a conclusion that POWs can be killed without following the 'due process' rule. There are a good number of scholars who are of the opinion that prisoners of war should not be killed.¹⁰⁰ One can draw a conclusion that the rule is that POWs will not be killed. The exception to this rule is that if a POW has been involved with crime for which death is the penalty, he can be killed if so decided by the Qazi. According to Mohammad Hamidullah,¹⁰¹ a big number of Muslim jurists are of the opinion that prisoners cannot be held liable for damage they inflicted on Muslims lives or property while combatants. In view of above, this does not seem to be a correct approach.

Other POWs, according to the Qur'an,¹⁰² can have any of the four fates: Freed gratuitously conditional or unconditional, or exchanged with ransom, exchanged with Muslim POWs in enemy's hands.

Preventive detention is allowed in Islam only to prevent a detainee from absconding, because freedom of movement is one of the fundamental rights of the man guaranteed by Qur'an.¹⁰³ Jurists (fuqaha) have forbidden detention except when necessary to facilitate a criminal trial. Habs (imprisonment) for them is wide enough to include arrest and preventive detention. In effect, it is deprivation of the right of personal liberty.¹⁰⁴ Jurists are of the opinion that Qazis have to inspect jails and make order to release those who are kept there unjustly.¹⁰⁵ Thus, in this limited sense, Islamic jurists recognize preventive detention as a legitimate state function for some specific purposes. Some call it habs ihteyat (precautionary detention), some others call it kashf wa istebarrh (discovery and acquittal arrest), or ikhtibar (trial or examination arrest). In all cases, arrests have to be for a temporary period,¹⁰⁶ more appropriately during the trial. To this

⁹⁷ *Al Jazeera*, 6 May 2008. Also see, *The Muslim World*, 2nd Issue of May 2008.

⁹⁸ See Sheikh Fysal Mawlawi, "Islam and Kidnapping Innocents", at <<http://islamonline.net/english/Contemporary/2004/09/Article01.shtml>>

⁹⁹ *Ibid.*

¹⁰⁰ Ibne Rushd expresses his view in *Bidayat Al-Mujtahid* (Beirut: *Dar al-Fikr*, n.d.), p. 98. It is also mentioned in Ibne Kathir, *Tafseer Ibne Kathir* (Beirut: *Dar Ihya' al-Turath al-Arabi*, 2000), vol. 4, p. 173.

¹⁰¹ See Mohammad Hamidullah, *Muslim Conduct of State* (Lahore: Mohammad Ashraf, 1996) p. 214.

¹⁰² See the Qur'an, *Muhammad* (47): 4.

¹⁰³ The Qur'an, *al-Mulk* (42): 15.

¹⁰⁴ Awad M. Awad, "The Rights of the Accused Under Islamic Criminal Procedure", in Cherif Bassioni (ed.) *The Islamic Criminal Justice System* (London: Oceans Publications, 1982), p. 91.

¹⁰⁵ See *Al-Fatawa Al-Hindiyya* (This is a collection of *fatawa* compiled during the reign of the Mughal King Aurangzeb) See at : <[www. al-Islam](http://www.al-Islam.com)>.

¹⁰⁶ There is no consensus about the time, but it has to be the shortest possible time. See Al-Mawardi, *Al-Ahkam Al-Sultaniyya* (Beirut: Dar al-Kitab al-Arabi, 1994), p. 386.

effect, Al-Mawardi is of the opinion that, 'there are different opinions on it. Some say one month, others say it is undetermined and should be left to the Imam's independent reasoning – the last is more likely'.¹⁰⁷ Even though it is left to the discretion of Imam, it cannot be beyond the trial and conviction. It is not appropriate to detain a person for a longer period in the name of investigation. In al-Mabsut, Sarakhsi has rightly expressed his view that if someone is accused of adultery or rape, has to be kept in custody until the guilt is proved or disproved. This is to prevent the accused from escaping. This is applicable to other crimes also.¹⁰⁸

It can, therefore, be said that detaining any person for an unlimited period in the name of preventive detention or in the name of investigation is against the Islamic law. It is clear from the above paragraphs that a preventive detention is to detain the person until the disposal of the criminal case so that he does not abscond and thus escape the punishment. Some scholars hold the opinion that Islam provides for compensation to the accused who is placed under detention as a precaution but whose innocence is later established. As a proof they cite the ruling of Ali for compensation (ghurrah) to be paid to the mother when miscarriage resulted from an official's mishandling of her detention.¹⁰⁹ The author is of the opinion that the right of the detainees has to be judged vis a vis the states security. For this a meaningful balance has to be created. We can strike a balance only when judicial authorities frequently review detentions. This will be an exceptional situation.

Torture to Prisoners

Detainees, wherever they are, have been given frightful treatment. It is known to the world now from photographs and stories narrated by prisoners released from the Guantanamo Bay detention camp and the Abu Ghraib prison.¹¹⁰ The vivid photographs of heinous abuse of prisoners of the Abu Ghraib prison accentuate that detainees were undermined, humiliated and tortured in manifest ways by the US Army, with or without the consent of the Army Commanders of the US Army.¹¹¹ It is said that they are happening because the Bush Administration has abandoned the Geneva Conventions for the war against the Taliban and al-Qaeda on the grounds that they are not legitimate warriors as defined in the Geneva Convention.¹¹² The British army has also caused atrocities to Iraqi prisoners. All kinds of maltreatments of prisoners are grave violation of the Geneva Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1948 (Anti-Torture Convention), which has come into force on 26th June 1998. The heinous act of sexual torment by prostitutes in the course interrogation is serious and despicable. This has been revealed in a draft manuscript obtained by the Associated Press. The author writes that he witnessed about 20 such interrogations, where interrogators, who were female hired civilians, wore miniskirts and bathing costumes and while asking questions they rubbed their bodies against detainee's bodies and commented on their erections.¹¹³ This kind of interrogation is against the law of every civilized country; it is violation of prisoner's rights and

¹⁰⁷ See *Al-Ahkam Al-Sultaniyyah*, *ibid*, pp. 386-387.

¹⁰⁸ Awad and Awad, "The Right...", footnote 104, at p. 103.

¹⁰⁹ Taha J. al 'Alwani, "Rights of the Accused in Islam", 11 *American Journal of Islamic Social Sciences*, 1994, p. 504.

¹¹⁰ The United States has asserted that at the Guantanamo Bay detention camp, detainees are not abused, psychological and physical. This has been falsified by the stories of abuse told by some of the detainees who were released from the camp, including the story of abuse narrated by Mr. Mubanga, one of the four British citizens, released from the camp on the request of the United Kingdom. See *New Straits Times*, 5 December 2005. The International Committee of the Red Cross (ICRC) also prepared 24 pages confidential report on which disclosed the abuse and ill treatment of prisoners in Iraq between March and October 2003. This report could not remain confidential. See *New Straits Times*, 31 May 2004, and 27 July 2004.

¹¹¹ See *New Straits Times*, 28 September 2005 and 3 October 2005.

¹¹² See Andrew Sullivan, "How torture became a matter of routine", *The Times*, 2 October 2005.

¹¹³ See *American Post* 28 January 2005. This has been re-printed in *New Straits Times*, 29 January 2005.

freedom of religion also.¹¹⁴ Referring to an independent report the BBC News on February 5, 2005 said that some of the detainees due to abuse and staying away for so long time might develop some kind of irreversible psychological symptoms.

Donald Rumsfeld, the Defence Secretary of the United States, has tried to justify these heinous acts by saying that the inmates of the Guantanamo Bay were not 'common prisoners'. They are enemy combatants.¹¹⁵ So, they should not be considered as ordinary criminals or POWs. He said so to deny them a fair trial to them. Jan Clabbers has rightly written, "Indeed, the very proclamation by a state that it is engaged in a war against terrorism, or against certain specified terrorist network, invoking the right of self-defence and relying on the seeming acquiescence of the world community in this conceptualization, would seem to imply the applicability of humanitarian law. One cannot after all claim to be engaged in warfare, yet also claim to be entitled to ignore the applicable rules; one cannot, as the saying goes, blow hot and cold."¹¹⁶

Similarly, when cruel, humiliating and degrading treatment of Abu Ghraib prisoners became a blatant cause of worldwide criticism of the U. S. Army, Donald Rumsfeld stated that Geneva Conventions would apply to all detainees in Iraq. But now U. S. is mulling to deny this protection. Pentagon opened the door to denying this protection to foreign fighters captured in Iraq, saying legal analysis by government lawyers suggests that individuals could be exempted on a case-by-case basis.¹¹⁷ They are, thus, trying to create an exception to the applicability of the Geneva Convention, and the Anti-Torture Convention, which, according to the author, is based on surmises.¹¹⁸

All kinds of torture inflicted to prison inmates at the Abu Graib prison or secret prisons and at the Guantanamo Bay detention camp are violation of the Anti Torture Convention. On 19 May 2006, the UN Committee against Torture directed the US to close any secret prison abroad and the Guantanamo Bay facility saying they violate the Anti Torture Convention. The Committee said, "The Us should ensure that no one is detained in any secret detention facility under its de facto effective control" and to "investigate and disclose the existence of any such facilities." It further said, "Detaining persons in such conditions constitutes, per se, a violation of the Convention." This has also been said by 10 independent experts, who examined the US record at home and abroad, also urged President Bush's administration to 'rescind any interrogation technique, that constituted torture or cruel treatment.¹¹⁹ In view of the UN Committee's request, the US has no moral right to maintain prisons and the detention camp. They should be closed. Prisoners should either be tried or freed.

The Detainee Treatment Act 2005 and the Military Commissions Act 2006, the United States have authorized tough interrogations and has provided protection to interrogators. The stories of atrocities caused to detainees are being accentuated by those who have been released recently, including citizens of Pakistan, Britain, Australia and Sudan. This is nothing but ignoring the UN Committee's request and negations of the willingness expressed earlier to respect the feelings of the EU, UN and the rest of the world.

¹¹⁴ It is an act of deliberately eroding the religious values of Islam. It is needed to say that most of the detainees profess Islam as their religion.

¹¹⁵ See *New Sunday Times*, 15 February 2004. This may be noted here that those terrorists cannot be considered under the international law as enemy combatants.

¹¹⁶ "Rebel with A Cause? Terrorists and Humanitarian Law", 14 *European Journal of International Law* (EJIL), 2003, p. 299.

¹¹⁷ See *New Straits Times*, 28 May 2004.

¹¹⁸ We may note here that President Bush, after the September 11, 2001 attacks on the United States, declared that al-Qaeda and Taleban fighters captured in Afghanistan or elsewhere were unlawful combatants not covered by the Geneva Conventions. However, they will be treated humanly nonetheless "in the manner consistent with the Geneva Conventions".

¹¹⁹ *New Straits Times*, 20 May 2006.

By virtue of the 1945 International Military Charter of the Nuremberg, Articles 3, 5 and 147 of the Geneva Convention and Article 1 of the Anti-Torture Convention, all kinds of torture inflicted on detainees can be said to be war crimes and those who are responsible should be tried war commit it. The best court for their prosecution is the International Criminal Court as Article 27(1) says of the Rome Statute says that no one is above the law; and according to Article 27(2) immunity will not apply to them. But the problem is that the United States is not a party to the Rome Statute.

The United States is trying some Army men that have been highlighted worldwide by the media, under the criminal justice system of the US Army. We know the prosecution case of a lady officer, who was found guilty of making pyramid of naked Iraqi detainees and putting them chained in the Abu Graib prison. Recently, Lewis Welshofer, a high-ranking officer was found guilty of negligent homicide of an Iraqi General during brutally designed interrogation. This is notable here that this lesser degree crime carries the maximum penalty of three years imprisonment. This case has been criticized by David Danzing, the manager of a campaign to end torture for Human Rights First, a New York Based group. He said that the trial showed there was of great confusion about what soldiers had been doing in Iraq.¹²⁰ These kinds of comments are also there with respect to other trials. The Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907 and Hague Convention (X) Adapting to Maritime War of the principle of the Geneva Conventions 1907 provide for 'command Responsibility'¹²¹ It provides that there is a relationship of junior and superior officials; and the superior one will be liable if the superior one had the knowledge, and he negligently failed to control.¹²² Under this law there should have been many prosecutions, but the irony is only one high-ranking officer has been punished and that too with lower degree of punishment. This shows insincerity of the United States.

In Islam, POWs are dealt with a predominate sense of compassions and clemency. POWs have right not to be abused or tortured. To abuse POWs because they fought against those who captured them is totally prohibited. This is because it will amount to revenge, which is strictly prohibited. Also, it is notable that belligerency during the war as such is not a punishable crime. During Prophet's time and even after that during Khulphah Rashedun's time, there is no case of abuse or torture. Punishment is allowed to know information about the enemy. However, it should never reach the level of outright torture and must not affect the health of the prisoner. Sheikh Salman al Oadah in "Who is there for our prisoners of War" notes a hadith: The prophet (s.a.w.) fought against the people of Khayber until they were forced to retreat to their castle... There was an agreement between them and the Prophet (s.a.w.) that they will leave the place and handover all gold and silver they had. They concealed a purse. On interrogation the responsible person replied that all the money of the purse was utilized in the war.¹²³ With mild punishment, he told the truth. One can infer from this hadith that mild punishment can also be given in order to know the truth. When Imam Malik was asked whether it was permissible to torture a POW to extract from him information about the enemy's weaknesses, he said that he had never heard of such a thing. It is clear from the hadith discussed above and the view of the jurist Imam Malik that abuse and torture to POWs is totally prohibited. However, mild punishment, without inflicting any serious injury or mental agony, is allowed so long it is for knowing the truth or secret of the enemy if war is continued. According to a hadith, a slave belonging to the enemy

¹²⁰ See *New Straits Times*, 23 January 2006.

¹²¹ It is "Responsibility commanders and other high officials for war crimes committed by sub-ordinate members of the armed forces or other persons subject to their control."

¹²² See Timothy Wu and Yong-Sung King, "Criminal Liability for Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in the United States Law", 38 *Harvard International Law Journal* (Harv. ILJ), 1997, p. 290; M. Ferial Tinta, "Commander on Trial: the Balakis Case and the Doctrine of Command Responsibility under International Law, 47 *Netherlands International Law Review* (NILR), 2000, p. 293; Leslie Greene, "Command Responsibility in International Humanitarian Law", 5 *Transnational Law and Contemporary Problems* (TLCP), 1995, p. 319.

¹²³ Ibne Hibban, *Sahih* (Beirut: Moassah al-Risalah, 1993), vol. 11, p. 607, *hadith* no. 5199.

was captured. He was being beaten by the companion's of the Prophet (s.a.w.) to reveal the hideouts of Abu Sufyan and his companions. He told about others except Abu Sufyan as he did not know about him. He was further being beaten. The Messenger of Allah (s.a.w.) had been praying. When he saw that excessive beating, he stopped praying and said, "I swear by Allah in whose hand is my soul, you beat him when he tells you the truth and let him go when he lies to you."

We can infer from the above paragraphs that all acts of torture and abuse of prisoners of war that is commonly being practiced in Abu Graib prison, Guantanamo Bay or elsewhere are prohibited by Islam. On the contrary, the Islamic teaching to treat POWs is based on compassion and clemency. In Surah Al- Insan, ayah 8, Allah (s.w.t.) told us one of the characteristics of a pious Muslim as: "And they give food...to the miskin (poor), the orphans, and the captive." Qatadah, while commenting on this ayah said that Allah (s.w.t.) had ordained us to be nice to captives.¹²⁴ It has been stated in Tafsir Ibne Kasir that Muslim and non-Muslim captives will be treated alike.¹²⁵ It is accentuated by a hadith "Istausu Bil-Usari khairan", meaning be nice to captives.¹²⁶ The following are some notable rights that are based on ahadith and opinions of jurists:

1. Right to nourishment – We have seen above that this right has the basis of ayah 8 of surah Al-Insan. It is accentuated by a hadith also. There is a famous hadith that a woman brought food for Prophet Muhammad (s.a.w.). He asked the lady to give that food to captives.¹²⁷
2. Right to remain on his religion – It is loud and clear in Islam that there is no compulsion in religion. Thus, captives have right to change their religion on their free will. If any one wants to do that, he will be converted to Islam. POWs were never forced to accept Islam. There is a famous hadith to prove it: Thamamah was arrested by the Muslim Army. He was brought to a mosque and was tied with a pillar. Prophet (s.a.w.) asked from him, 'What have you, O Thamamah?' Thamamah replied, "Actually I have a lot going for me. If you kill me, you kill a man whose blood will surely be avenged. If you are generous, then you are generous to a man who knows how to be grateful..." He was left in that condition. Next day same thing happened, Third day when he gave the same reply, Prophet Muhammad (s.a.w.) freed him. Afterwards, he embraced Islam.¹²⁸ We can draw one more conclusion from this hadith that in case a captive repents, he can be freed without ransom.
3. Right to remain silent – POWs have right to remain silent. Any confession taken under duress will not be considered as an acceptable confession.¹²⁹
4. Right of clothing – There is a hadith narrated by Jabir, that, "After the Battler of Badr, POWs were brought. Among them was Al-Abbas. He did not wear a shirt, so the Prophet (s.a.w.) provided him a shirt of his size.¹³⁰ It is clear from this hadith that POWs should be given nice cloth to wear.
5. Right of lodging – As during Prophet's time there was no proper jail system, POWs were kept in mosque, houses. Once brought one prisoner to his house also. But in all cases, they were treated nicely. Jurists are of the opinion that POWs should not be kept at a

¹²⁴ See Al-Tabari, *Tafseer Al-Tabri* (Beirut: *Dar al-Fiqr*), vol. 29 p. 209.

¹²⁵ See vol. 42, p. 456.

¹²⁶ See Tabrani, *Muajjam Kabir* (Kairo: *Maktab al-Ulum Wa al-Hukm*, 1983), vol. 22, p. 393.

¹²⁷ Abu Daud, *Sunan* (Beirut: *Dar al-Fikr*, 1863), vol. 3, p. 244, *hadith* no. 3332.

¹²⁸ Bukhari, see *supra*, vol. 67, p. 644, *hadith* no. 4372.

¹²⁹ See S. A. Farar, "Islamic jurisprudence and the role of the accused: a re-examination", 23 *Legal Studies*, p. 587; Taha j. al Alwani, "The Rights of the Accused in Islam", 11 *The American Journal of Islamic Social Sciences*, p. 506; Ibn Hazm, *al-Muhalla* (Beirut: *Dr al-Aa al-Jadid*), vol. 11, p. 141.

It is notable here that starving, beating, consignment are considered as duress. See Abd al Razzaq, *al-Musannaf* (Beiru: *al-Maktab al-Islami*, 1403 Hijri), vol. 10, p.193.

¹³⁰ *Al-Bukhari*, *supra* note , vol. 3, p. 1095, *hadith* no. 2846.

dark or damp place.¹³¹ Prophet (s.a.w.) saw that some captives were kept in scorching sun. He asked their wardens to keep them under at a shaded place, to provide them water to drink and to give them chance to sleep.¹³²

6. Right to treatment – Prisoners have right to get treatment. Prophet (s.a.w.) asked his companions not to do any hardship to injured POWs.¹³³ It is clear from this hadith that injured POWs should properly be treated.
7. Right to be with family members – It is said that a mother should not be separated from her child, nor should that child be separated from its father. Brothers also have to be kept together. Prophet (s.a.w.) on one occasions said, “Whoever separates a mother from her child will be separated from his own loved ones on the day of judgment.”¹³⁴
8. Right to write a will – According to Islam detainees have right to write will. Their wills have to be executed by the state or the other state.

The above discussed Qur’anic ayah and ahadith command to be compassionate towards POWs and treat them nicely. Perhaps in view of these, the Universal Islamic Declaration of Human Rights writes in its Article VII: “No person should be subjected to torture, in mind or body, or degraded, or threatened with injury either to him or to any one related to...”¹³⁵

Denial of Procedural Justice

The ‘due process’ rule is a widely accepted rule of procedural justice. It serves to restrain governments from arbitrarily depriving a person’s life, liberty or property. It stresses the need to protect individuals’ liberty, which is an important constitutional right. Examples of due processes rights are: right to remain silent, right to counsel, right to bail and right to a speedy and public trial.¹³⁶ According to this rule, thus, all detainees, foreign or local, have to be presented before the court within the shortest possible time, which is generally determined as 24 hours. This rule was first developed by the House of Lords, but very soon became a universally accepted rule. In the United States the Fifth Amendment to the Constitution has a due process clause. Denial of the due process rule is considered as denial of justice and thus violation of a well established human right (emphasis added). In *Baker v. Wingo*¹³⁷, which is considered as an epoch-making judgment, Justice Powell, in his judgment discussed four strong arguments - length of delay, reason of delay, the defendants assertion of the right of failure to assert it, and prejudice caused by the delay - that could possibly be leveled against the ‘due process’ rule and rejected all of them. According to him, the rule is imperatively demanded to ensuring justice.¹³⁸

The detainees of the Guantanamo Bay, as discussed above, cannot be considered to be POWs. Therefore, they have to be treated as alleged criminals and should be brought before the court of the US or be sent to the country of which they are the subjects. The United States is not presenting them before the regular court of the country or the military court of the country. President George W. Bush unveiled a plan of establishing a system of military commissions to try the detainees that proved to be tainted with arbitrariness. The Attorney General of Britain has also

¹³¹ Zakaria Al-Ansari, *Asnal Matalib*, vol. 9, p. 366. See at: <www. Al-Islam>.

¹³² Al-Waqedi, *Maghazi*, p. 515. See at: <www. al-Islam>.

¹³³ Al Hakim, *Mustadrik* (Beirut: *Dar al-Kutub al-Ilmiyyah*, 1990), vol.2, p. 168, *hadith* no. 2662.

¹³⁴ Al-Tirmidh, *Sunan* (Beirut: *Dar Ihya’ al-Turath al-Arabi*, 1995), vol. 3, p. 580, *hadith* no. 1283.

¹³⁵ See at: <www.kavkazcenter.com/eng/islam/hrislam>

¹³⁶ See Howard Abadinsky, *An Introduction to American Legal System* (New Jersey: Prentice Hall, 2002), 5th Ed. p. 62-65; Daniel E. Hall (ed.), *Criminal Law and Procedure* (New York: West Legal Studies Pub., 2002), 3rd Ed. p. 48-51.

¹³⁷ 404 US 514 (1972).

¹³⁸ He expounded in this case that determination whether a particular defendant has been denied speedy trial is to be made on case-by-case basis. Judges must look at the length of the delay, reasons for the delay, timely assertion for the right to a speedy trial and prejudice to the defendant as a result of the delay.

expressed this kind of feeling on it. Recently, High Court ruled that President Bush had no authority to order such tribunals, which it said, contravened the Geneva Conventions.¹³⁹

In Epoch-making judgments of the US Supreme Court given in 2004 and 2008, noted above, the U. S. Supreme Court ruled that the war on terrorism did not give the American Government a 'blank cheque' to hold a U S citizen and foreign-born terror suspects in legal limbo. The Court refused to endorse a central claim of the Bush Administration that the government has authority to seize and detain terrorism suspects and indefinitely deny access to courts and lawyers while interrogating them. This case, according to authors, has provided opportunity to the detainees to go the Federal Court against their detentions and seek justice. The American Post has rightly commented that the ruling is the most significant test so far of executive power in the fight to root out and contain global terrorism.¹⁴⁰Based on this ruling, some cases have started coming in the District Courts, but the results there are not so encouraging.¹⁴¹Same kind of feelings has also been expressed by the UN General Assembly. The General Assembly also wants them to be tried or freed.

This is far from clear that detaining them without a fair trial of international standards will be sheer violation of the 'due process' rule. Any other kind of trial or presenting them before any administrative committee or board will also be its violation. In most of the cases, these will generally result in extension of the detention.¹⁴² This gets support from the recent judgment given by the House of Lords in *A (FC) and Others v. Secretary of State for House Department and X (FC) and Another v. Secretary of State of House Department*¹⁴³, where appeal by 9 detainees of the Belmash prison, who are being held there indefinitely, said: "detaining foreign terrorist suspects without trial breaches human rights law." and "Measures are incompatible with European Human Right laws. Lord Nicholls has remarkably said in his judgment that "Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law." To the surprise of the authors and many others, instead of honoring the verdict of the court, the Home Secretary said that the prisoners would remain in the prison until the law was reviewed. And in the mean time, the Government would review the law and if possible would make necessary changes to address the concern raised by the House of Lords.¹⁴⁴Author is of the opinion that the verdict of the Court is clear and the detainees should either be charged or released; detaining them is violation of the European human rights laws. To say to review the law is nothing but a delaying tactic. The detainees should go to the European Court.

The situation of detention before deportation hearing is also the same. It has been clarified in the Harvard Law Review notes on cases entitled "The Supreme Court, 2002 Term: Leading Cases: 1. Constitutional Law: D. Due Process."¹⁴⁵ In the United States, under the Supreme Court's century-old plenary power doctrine, immigration matters 'are so exclusively entrusted to the political branches of the government as to be largely immune from judicial enquiry or interference.¹⁴⁶ At the same time, however, the Court has required the government to choose 'a constitutionally permissible means of implementing' its immigration policy. In balancing these two principles, the

¹³⁹ See *New Straits Times*, 1 July 2006.

¹⁴⁰ See *New Straits Times*, 30 June 2004.

¹⁴¹ See *New Straits Times*, 26 June 2004.

¹⁴² Recently, in view of the Supreme Court's decision, the Bush regime has decided that military will review the individual cases of the detainees of the Guantanamo Bay. For this purpose a panel of three military officers is reviewing the detention cases. Perhaps, the United States is doing this so that it could plead before the Federal Courts in cases filed by the detainees that they were provided protection of the 'due process' rule.

¹⁴³ [2004] UK HL 56.

¹⁴⁴ *BBC News*, 8:1, 16 December 2004.

¹⁴⁵ 117 *Harvard Law Review* (Harv. L. Rev.), 2003, p. 287.

¹⁴⁶ See *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952); *Kleindienst v. Mandel*, 408 U. S. 753 (1972). Also see David Cole, "In Aid of Removal: Due Process Limits on Immigration Detention", 51 *Emory Law Journal* (Emory L. J.), 2002, p. 103.

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Court has generally followed two trends. First, it has typically limited the plenary power doctrine to 'substantive criteria for admission and exclusion, while applying mainstream constitutional principles to 'procedural' matters such as deportation hearings. Second, the Court has traditionally afforded robust constitutional protection to permanent resident aliens, even while withholding such protection from other categories of non-citizens.¹⁴⁷ In *Demore v. Kim*¹⁴⁸ the Supreme Court contravened both of these trends by invoking the plenary power doctrine to hold that the mandatory detention of criminal resident aliens pending their deportation hearings does not violate the Due Process Clause of the Fifth Amendment. The author is of the opinion that *Demore* is not a correct approach, as the plenary power doctrine has not received wide support, because of violation of human rights in arbitrary detentions.¹⁴⁹ The due process law should be applied without any discrimination.

Notwithstanding the existence of a double standard across constitutional cultures in the United States, the line between citizen and non-citizen has not been particularly firm one. The PATRIOT Act does not specifically mention about discrimination. But in practice, foreign citizens in the name of investigation are being detained for a longer period, violating the due process rules.¹⁵⁰ This kind of practice has been criticized by Non-Governmental Organizations (NGOs) working for protecting human rights, the media and the public.¹⁵¹

The United Kingdom is not different than the United States. The Anti-Terrorism, Crime and Security Act 2001, in effect, is not different than the U. S. law discussed above. The Act gave the police sweeping new powers, including the right to detain foreigners indefinitely only on suspicion of their involvement with terrorism. There are many foreign nationals detained in the United Kingdom without charge or trial. There is discrimination between foreigners and citizens of the country; and to the surprise of the authors, the British Courts are supportive to this practice. In *A and Others v. Secretary of State for the Home Department*¹⁵² the respondent detainees were non-nationals resident in the United Kingdom. They were detained under Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State extended powers to detain resident aliens who could not be expelled in the ordinary way if he suspected that they were terrorists. The power to detain involved derogation from the right to liberty guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedom 1950 (as set out in Schedule 1 to the Human Rights Act 1998). The detainees appealed to the Special Immigration Appeals Commission on the basis, inter alia, that the 2001 Order made under the Act and the 2001 Act violated the prohibition on discrimination under Article 14 of the convention as they allowed only suspected terrorists who were non-nationals to be detained when there were equally dangerous British nationals who were exactly in the same position and who could not be detained. This contention was accepted by the Commission which found section 23 of the 2001 Act incompatible with Articles 5 and 14 of the convention, in so far as it

¹⁴⁷ See *Zadvydas v. Davis*, 533 U. S. 678 (2001); *Landon v. Plasencia*, 459 U. S. 21 (1982).

¹⁴⁸ 123 S. CT. 1708 (1982).

¹⁴⁹ See David Cole, footnote 150 (infra), at p. 108.

¹⁵⁰ See David Cole, "Terrorism and the Rule of Law", A Review of Ronald Daniels, Patrick Macklem, Kent Roach (eds.) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), p. 499.

¹⁵¹ See Lisa Finnegan Abdolian and Takooshian, "The USA PATRIOT Act: Civil Liberties, the Media, and Public Opinion", 30 *Fordham Urban Law Journal* (Fordham Urb. L. J.), 2003, p. 1429; N. Chang, "The USA PATRIOT Act: What Is So Patriotic About Trampling on The Bill of Rights?", < <http://www.sevenstories.com> >; N. Chang, *Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties* (New York: Seven Stories Press, 2002); A. Clymer, "Anti-Terrorism Bill Passes: US Gets Expanded Powers", *New York Times*, 26 October, 2001; A. Goldstein, "A Deliberate Strategy of Disruption", *Washington Post*, 4 October, 2001; Abdul Haseeb Ansari, footnote 6 at p. ccxxxv.

¹⁵² [2003] 1 ALL ER 816.

permitted detention of suspected international terrorists in a way that discriminated against them on the ground of nationality.

The Court of Appeal reversed the decision. The court held that section 23 of the 2001 Act and the 2001 Order were not incompatible with the Convention. Although the Convention required an actual or imminent emergency before a contracting state might lawfully derogate from the protections afforded by Article 5, there was ample material on which the Secretary of State could conclude that an emergency of requisite quality existed. The Terrorism Act of 2006 presents a refined version of the 2001 Act. It has some preventive measures that will if given effect remove the element of arbitrariness to some extent. British Courts can play a positive role in preventing unnecessary and excessive violations of human rights.¹⁵³

The author is of the opinion that creation of an exception on the given basis will have ample scope of arbitrary use of the exception. This will result in undermining the human rights guaranteed by various international and national legal instruments. Preventive detention can be justified for protecting the security and integrity of a country.¹⁵⁴ Such detentions are made either on the basis of specific constitutional provisions or specific legislations. These legislations have no provision for bail and judicial review from time to time, which is warranted for protecting human rights and broadly speaking for ensuring a laudable justice system. In *Aksoy v. Turkey*¹⁵⁵ the European Court of Human Rights expounded that “The Court would stress the importance of Article 5 in the convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the state with his right of liberty.” Unjustified detentions amount to arbitrary interference of states with internationally acclaimed right to liberty and due process rights. The author has written above and would like to reiterate that for protecting human rights, especially personal liberty, a meaningful balance has to be created between preventive detention and the national security. This is only possible when detentions are reviewed every three-months by the regular courts of the country.¹⁵⁶ The court in *Aksoy* has emphasized this, also. The Court says in that case that judicial control of interferences by the executive with the individual’s right of liberty is an essential feature of the guarantee embodied in Article 5 which is intended to minimize the risk of arbitrariness and to ensure the rule of law.¹⁵⁷ The preventive detention law should apply uniformly to aliens and nationals.¹⁵⁸

¹⁵³ See Razman Bin Abdul Rahim, “The United Kingdom Terrorism Act 2006: From the Bill to the Act”, [2008] 4 MLJ cxlii.

¹⁵⁴ This may be noted here that preventive detentions are made either on the basis of a specific constitutional provision or a specific legislation like the Internal Security Act of Malaysia. Preventive detentions are different than detentions of suspected terrorists. Those who are detained under the preventive detention law can remain under detention for a longer period without producing before the court, but their detentions have to be reviewed by the competent administrative authority or the court, as the case may be, from time to time.

¹⁵⁵ (1996) 1 BHRC 625.

¹⁵⁶ This should be noted that most of the countries have given the power to review to the High Court. Some other countries have made tribunal for this purpose.

¹⁵⁷ At p. 643. Also see *Chahal v. UK*, (1996) 1 BHRC 405. In this case, pertaining to Article 5 the Court said, “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and *in accordance with a procedure prescribed by law*...(f) the lawful arrest or detention of a person... against whom action is being taken with a view to deportation.” This does not mean that the detentions will be arbitrary and for unlimited periods.

¹⁵⁸ The Court of Appeal in *R. v. Secretary of State for Home Department*, [2002] All ER 373, has also expressed the same view. The Court says that a person cannot be detained because he lacks British nationality. In order to detain him there must be some other justification, such as that he is suspected of having committed a criminal act. If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists, -and we can see powerful arguments in favour of such a derogation-the derogation ought rationally to extend to all ...suspected terrorists. This is a cautious

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There has been a general practice in many countries that for convictions the level of proof required should be 'beyond reasonable doubt'. This threshold is applicable in trials of terrorists also. The Home Secretary of the United Kingdom wants to apply a lower evidence threshold for terror cases. He suggests the following three important changes in the existing law, which is already considered as too harsh and violative to human rights: 1. Terror cases should have a lower evidence threshold, perhaps requiring the prosecution to prove the case on the 'balance of probabilities'. 2. Terrorism trials should partly be held in secret, with certain elements not being communicated to the defence, so as to protect British intelligence sources.¹⁵⁹ 3. Setting up a group of anti-terrorism judges who alone would be entitled to examine information judged sensitive for national defence and which would not be made public. This attempt to toughen the anti-terror law has been criticized by human rights activists. Liberty Campaigns Director Mark Littlewood told the Press Association: "Britain already has the most draconian anti-terror laws in the Western Europe... Further undermining trials by jury and radically reducing the burden of proof is wholly unacceptable. The plan for such highly secretive trials, involving security-vetted judges sitting without a jury will simply undermine civil rights. The threat of terrorism needs to be dealt with in increasingly sophisticated ways." Neil Durkin from Amnesty International U. K. commented: "We would be extremely concerned at any further erosion of the right to receive a fair trial in the U. K. in the name of combating terrorism. What is particularly worrying about these comments from the Home Secretary is the suggestion that there might be some wider introduction of internment - like measures that have already created a small-scale Guantanamo bay in our own backyard by imprisoning more than 14 foreign nationals without charge or trial."¹⁶⁰

The author is of the opinion that the move to further tighten the law will promote further erosion of human rights of personal liberty and fair trial. Undermining the trials by reducing the threshold from 'beyond reasonable doubt' to 'on the balance of probability' will not be in the interest of justice. There can be a special court comprising specialist judges. But to have a secret trial is not acceptable because it will undermine the due process rights.

We have noted above that according to Shari'ah, if any POW is found guilty of any crime, he has to face a trial; and if he is found guilty, he is accordingly punished. We have also noted that detaining any person for a short period to prevent him from absconding or during the trial is permitted. In Islam, there is no concept of keeping anybody as captive for years in the name preventive detention is dilation of human right as Allah (s.w.t.) has clearly said that "He it is who hath made the earth subservient unto you, so walk in the paths thereof and eat His providence."¹⁶¹ It is clear from this ayah that except when necessary, arrest and detention will be violation of this ayah. It is required that detainees must be informed of the crime they have committed, and he should be provided right to defend himself. Although Shari'ah is not explicit about right to attorney, it has not explicitly been denied. This is because in absence of this right there will be chances that a smart and vocal person will win the case.¹⁶² It is, therefore, suggested

approach of the Court. The popular view of the courts is that derogation is allowed only by the grave emergency threatening terrorist attacks.

¹⁵⁹ The idea is that close door trials will be conducted by "security-cleared" judges. It will be a part of a two-tier trial system - first hearing in close door in a special court and the second hearing before the conventional court - enabling the use of intelligence material in terrorism cases. The second hearing will be based on the summary prepared by the court of first hearing.

¹⁶⁰ See *New Straits Times*, 3 February 2004. This may be noted that in the United Kingdom, about 561 detainees of different nationalities are there in different jails. See *New Straits Times*, 1 June 2004. This number is increasing.

¹⁶¹ *Sureh al-Muluk* (67):15.

¹⁶² See Awad M. Awad, "The Rights of the Accused under Islamic Criminal Procedure", footnote 104, pp. 97-99.

that for ensuring justice to the person who really deserves it, right to attorney should be available to litigants or accused persons.

It is clear that in the Shari'ah the modern concept of preventive detention has no place. It is rather prohibited. If someone is unnecessarily detained for a longer period will be entitled to claim compensation (ghurrah). But this claim can be entertained when he is presented before a court and the court determines him not guilty. However, in the changed circumstances and for protecting the interest of a state, preventive detentions, other than that the detentions at the Guantanamo Bay, is a debatable issue.

CONCLUSION

All efforts, including the Convention on Nuclear Terrorism 2005, have failed to have a viable definition of 'terrorism', which can widely be acceptable. The fight against terrorism, thus, has become directionless. It is necessary, therefore that all states should show willingness to forge a viable definition, and should make efforts to have consensus on it. It will be better if the United Nations formulates a definition taking into account all aspects of terrorism and its acceptability by almost all states.

Detaining people of different nationalities as enemy combatants in the name of war against terrorism, and torturing them in brutal form of interrogations and not presenting them before civil courts is illegitimate as it is denial of the 'due process' rule and violation of Geneva Conventions. Presenting some of them before a military tribunal and releasing some others on political pressure is just eyewash.¹⁶³ Their illegal detention and abuse is a blatant violation of human rights. What The United States and some other countries are presently doing is no less than an act of state terrorism.¹⁶⁴ The Amnesty International has rightly concluded that war on terrorism has led to widespread human rights abuse in Iraq, Afghanistan and at the Guantanamo Bay detention camp.¹⁶⁵ It is for this reason that in its 2008 decision, the US Supreme Court has ruled that detainees of the Guantanamo Bay have right to file habeas corpus writs before the US courts. It has rightly been desired by the United Nations that without any further delay, all detainees - where ever they are - should either be presented before courts of competent jurisdiction or be released. Islam wants prisoners of war be tried without any delay, or exchanged or released.

All kinds of physical or mental torture, humiliation or insult are inhuman and grave violation of the Geneva Conventions and the Anti-Torture Convention. They should be stopped immediately. In order to ensure the compliance of the treaty norms of the Conventions, the International Committee of the Red Cross (ICRC) should be allowed to have frequent visits to all jails and other places where prisoners of war are kept.¹⁶⁶ Those who are abusing helpless prisoners and

¹⁶³ The United States has done it in wake of the forthcoming presidential election in the country.

¹⁶⁴ Some of the examples of state terrorism are as follows: 1. Attacking a country for falsely alleged reasons; 2. Threatening a country to attack for no reasons; 3. Illegally occupying territory of another country; 4. During war, not following the principles of proportionality, discrimination and necessity; 5. Committing or supporting the act of genocide; 6. Use of weapons of mass destruction, e.g., chemical, biological, or nuclear weapons; 7. Supporting a despotic regime; 8. Supporting an illegal insurgency. 9. Performing illegal incursions in another country and killing innocent people and destroying properties; 10. Supporting terrorists by any means, or harboring them; 11. Weakening or dominating the economy of a country; 12. Giving subsidy on those agricultural items that substantially contribute the economy of developing or underdeveloped country or countries; 13. Supporting one or some of the groups involved in rioting in a country; and 14. Detaining people for indefinite period for no substantial reason (s).

¹⁶⁵ This may be noted here that the United States is of the view that by this war 50 million people have been liberated and their civil and political rights have been protected. See *New Straits Times*, 28 May 2004.

¹⁶⁶ Abdul Haseeb Ansari and Nik Ahmad Kamal "Terrorism, Law and Human Rights", Paper presented at the International Conference on Muslims and Islam in the 21st Century: Image and Reality, 4-6 August 2004, PWTC, Malaysia, Organized by the IIUM, Malaysia. The paper was later published in the *IKIM Law*

committing the act of torture and the high-ranking officers under whom these criminal acts are being committed are culprits of war crimes, thus be tried at the International Criminal Court. Francis Amar, the Head of the ICRC Regional Delegation, based in Kuala Lumpur, is also of this opinion.¹⁶⁷ It is also necessary to strictly enforce the principle of 'command responsibility', because the higher authorities, who have either connived or permitted torture, are also equally liable.

It is better if war against terrorism is fought in more collective way and organized manner. It will be better if we have regional co-operations about sharing information and making joint efforts to fight terrorism. It is appropriate to have a regional task force. Developed countries should support these forces. Islam is against all kinds of physical and mental torture inflicted on detainees/prisoners of war. States have to be nice with them. All kinds of interrogations in captivity is prohibited.

Prevention and control of terrorism requires immediate preventive measures to be taken by beefing up security around nuclear power generation plants. Likewise, adequate measures should be taken to storage and movement of nuclear materials, which can be used in making dirty bombs. The Director General of the IMO has expressed his concern, with the escalating trend of terrorism, the danger of using a ship as a bomb and hitting it with another ship or with a busy port cannot be ruled out. If it happens, it will certainly leave disastrous results. In view of this, possibility, he rightly emphasized on effective security to ships, ports and international straits, where a large number of ships pass through narrow watercourses. The author shares his concern and solicits for prudent efforts for avoiding any such possibility.¹⁶⁸

Islam is a religion of peace and amity. It prohibits all kinds of terrorism. The religious concepts of 'jihad' and 'Islamic brotherhood' have been misinterpreted and exploited by Muslim terrorists for their sinister and menacing objectives. They are not at all jihadists. To call terrorists as jihadists will be counterproductive. Terrorists should never be considered as martyrs also. Today's terrorism, in fact, is a civil war within Islam between a majority of normal people and a small minority. War on terrorism cannot be won unless the right-minded majority wins this war, and for that all states must help them. It is also warranted that 'long war' on global terror has to be sensibly enforced, as there are some Muslim insurgencies that require international support. They should not be fought with because al-Qaeda is providing extending some helps to them. On the contrary, it might turn into an undifferentiated campaign against Muslim insurgencies, which is not at all desirable. James Dobbins has rightly written that in the long war on al-Qaeda and terrorism, America should guard against being bogged down in a campaign of indiscriminate reactions against all Muslim insurgencies, regardless of their provenance. The best example is the insurgency of Mindanao. This has nothing to do with the West. The solution of this problem is negotiation within the constitutional framework of the Philippines, and negotiating some kind of amicable autonomy to the region. The west can play a meaningful role in it. Resorting to military action is not at all a solution.

Illegal detentions and torture of POWs and other detainees are totally against Shari'ah on POWs. Islam commands for compassion and clemency towards them. Shari'ah on POWs is well developed and generally humane. It is in total conformity with the Geneva Convention¹⁶⁹ and the

Journal, Vol. 9, No. 1, p. 12. Also see Abdul Haseeb Ansari and Nik Ahmad Kamal, "Contemporary Issues in Terrorism", in Abdul Rashid Moten and Noraini M. Noor, *Terrorism – Democracy – The West and the Muslim World* (Kuala Lumpur: Thompson, 2007) p. 119.

¹⁶⁷ See Ruslina Yusuf, "An eye on political prisoners", *New Straits Times*, 31 May 2004.

¹⁶⁸ See Abdul Haseeb Ansari and Nik Ahmad Kamal, "Prevention, Abatement and Control of Pollution of Straits: An Appraisal with Special Reference to the Straits of Malacca", *Malayan Law Journal*, pp. xxxvii-Ixxvi.

¹⁶⁹ The following rules are common: POWs will be in custody of the state; The state can exact labour from them; The detaining state will be responsible for their maintenance, which will be subject to repatriation; They will be subjected to humane treatment; they will obey the laws of the detaining state; they will be

Anti -Torture Convention, except that POWs can be taken as slaves. The author is of the opinion that in the contemporary world, no POW can now be enslaved because all Muslim countries are members of the Geneva Conventions, and it is also not provided in the Universal Islamic Declaration of Human Rights. As members, they have to follow the treaty norms arising out of the Geneva Convention, because Shari'ah ordains them to keep their promises.

permitted to perform their religious rites; their wills will be executed; they will not be exposed to brutality to procure information useful for the conduct of operation; and they should be released and repatriated without delay after the cessation of active hostilities.